AN ANALYSIS OF THE AVAILABILITY OF CAPPER-VOLSTEAD COOPERATIVE MEMBERSHIP TO AGRICULTURAL PRODUCERS

by

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CHAPTER I

INTRODUCTION

Agricultural marketing cooperatives are a unique type of business organization in the United States business structure. These associations are unique in that they offer individual agricultural producers an opportunity to join together and collectively process and market their products. This opportunity to collectively market their goods is made available to agricultural producers only through special enabling legislation, the Capper-Volstead Act, as such activity would otherwise likely be forbidden by antitrust laws. Section I of the Act provides that "[p]ersons 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 or foreign commerce, such products of persons so engaged."[1]

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[1]Section 1. 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 non-members to an amount greater in value than such as are handled by it for members. 7 U.S.C. 291 (1970).

The Capper-Volstead Act was enacted in 1922, a time when many farmers were facing economic hardship. Small, individual farmers were faced with the situation of having to sell their products to large processing firms on the processor's terms, or not sell at all. There was a distinctly inequitable balance of market power between farmers, who had little market leverage, and processors, wh had considerable market leverage. Inevitably, some processors used this market power imbalance to their advantage by keeping the prices they paid to farmers depressed. The Capper-Volstead Act was enacted to help alleviate this market power imbalance. Not only can agricultural producers collectively handle and process their goods under the Act, but, more importantly, they may join together to set a common price without violating the antitrust laws per se.

However, the structure of agriculture changed considerably as time began to date the Act. No longer were agricultural products being almost exclusively produced on small family farms. Instead, large processors, and even corporate conglomerates, were becoming involved in agricultural production. Some corporations had become directly involved in agricultural production with the acquisition and operation of farmland and other production components. Other corporations, already involved in the processing of agricultural commodities, have integrated backward into production through production contracts. This phenomenon of increased corporate activity in agriculture has clouded the distinction between "farmers" and other business entities.

Unfortunately, the price-setting authorization of the Capper-Volstead Act is attractive not only to small farmers, but to agricultural producers of all sizes. Without the Act's exemption, the mere act of association by producers to set a common price can constitute a violation of the Sherman Act.[1]

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[1]Philip Olsson, "Farmer Cooperatives--New Dimensions of Conduct," Proceedings of the National Symposium on Cooperatives and the Law, (Madison, Wisconsin: April 23-25, 1974), p. 87.

As Breimyer and Torgerson have noted: "Only by using the Capper-Volstead shelter can the integrators discuss price, for conversation about pricing is strictly forbidden to industrial and business trade associations."[1] Consequently, corporations in any way involved in agricultural production have been eager to label themselves "farmers", eligible to form or join marketing cooperatives. This leads to an interesting question: Who, or what, qualifies as "[a person] engaged in the production of agricultural products as [a farmer]"?

The answer to this question is not only important to corporations seeking cooperative membership, but is extremely important to cooperatives and farmers as well. As Knutson notes: "How a producer is defined can be expected to have major significance for the future structure of cooperatives if not agriculture in general."[2] The question is important to cooperatives because a cooperative having even one member who is not a "farmer" is not entitled to Capper-Volstead protection. The question is of further importance to farmers because if farmers were given antitrust protection so that they might organize among themselves to negotiate against big corporations, their ability to so negotiate would seem to be hampered if the big corporations are allowed to become fellow members of their cooperatives.[3]

At first glance, it would appear that defining "farmer" constitutes a relatively simple task. For the general public, the word "farmer" probably

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[1]Harold Breimyer and Randall Torgerson, "Farmer Cooperatives: By Whom and for Whom?" Economic and Marketing Information for Missouri Agriculture, Vol. 19, No. 4, Cooperative Extension Service, University of Missouri-Columbia, April 1971, p. 3.

[2]Ronald D. Knutson, "What is a Producer?" Proceedings of the National Symposium on Cooperatives and the Law, (Madison, Wisconsin: April 23-25, 1974), p. 142.

[3]Breimyer and Torgerson, p. 3.

brings to mind an individual tiller of land, rancher, or dairyman. Dictionary definitions, for the most part, are consistent with such perceptions--"a person who cultivates land or crops or raises livestock"; "one that rents or leases land for cultivation"; "a person whose primary occupation is the raising of crops or livestock".[1] However, as one commentator has noted: "American farmers are not one species but many. They may be anything from a weekend hobbyist in Bermuda shorts who raises strawberries for the gang at the office to a corporation with a million acres of land woven by teletype into a transcontinental empire."[2]

Upon closer examination, one finds that "farmer" has been given different definitions for different purposes. For example, the Census of Agriculture labels anyone farming a minimum number of acres or having a minimum dollar value of sales of agricultural products as being a "farmer". The Internal Revenue Code defines "farmer" to include all individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants.[3] Congress was specific in its definition of "farmer" in the Bankruptcy Act--" [farmer] shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their manufactured state, if the principle part of his income is derived from any one or more of such operations."[4] These examples make it

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[1]Webster's Third New International Dictionary, 1977 ed., s.v. "farmer."

[2]Statement of Edward Higbee as quoted in Harold F. Breimyer, "Who are Farmers?" Economic and Marketing Information for Missouri Agriculture, Vol. 12, No. 4, Cooperative Extension Service, University of Missouri-Columbia, April 1969, p. 2.

[3]John C. O'Byrne, Farm Income Tax Manual, 4th ed., (Indianapolis, Indiana: The Allen Smith Co., 1970), p. 3-4.

[4]11 U.S.C. 1(17) 1966.

apparent that there are no uniform qualifications for being a "farmer", even in the eyes of the law.

The issue of what qualifies as a "farmer", eligible for Capper-Volstead cooperative membership, has, until recently, received little attention from either the courts or commentators. In fact, only a handful of court decisions have dealt with this problem in any great depth. This is probably due to the fact that through the early years of the Act's life, corporate involvement in agriculture remained fairly insignificant. Corporate involvement in agricultural cooperatives was even less. However, the little attention given the issue by the courts through the first fifty years of the Act's life, did pretty much uniformly give agricultural producers of all types the "green-light" to participate in cooperatives. This contributed to an increasing awareness, not only by the public, but especially by fellow business competitors, that some corporate producers have been using this "green-light" to their advantage by actively participating in cooperatives for price-fixing purposes.

The increased attention being given cooperatives in recent years has led to some questions being raised as to whether the large corporation should be eligible for Capper-Volstead cooperative membership. It has been noted that if the true purpose of the Act was to give individual farmers acting through agricultural cooperatives "the same unified competitive advantage-and responsibility-available to businessmen acting through corporations as entities",[1] then it would seem illogical to allow corporations access to the Act's protection. Such firms already possess the form of organization Congress intended to confer

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[1] Maryland and Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458, 466 (1960).

upon the small farmer.[1] The United States Supreme Court finally addressed the issue of what is a Capper-Volstead "farmer" in 1978, and although its decision was limited in scope, the Court did conclude that not all agricultural producers are intended beneficiaries of the Act. This conclusion that not all agricultural producers are "farmers", brings into sharp focus the observations of one Congressman during recent hearings: "I think the field of agriculture and so-called farm conglomerates may be somewhat like Mr. Lincoln's dog--when they asked Mr. Lincoln how many legs the dog had, he said 'four'. They asked him, 'If you call the tail a leg, how many legs does the dog have?' And he said, 'Four, because calling a tail a leg doesn't make it a leg.'"[2]

Study Objectives

The primary objectives of this paper are to (1) review judicial interpretations of the phrase "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" as contained in the Capper-Volstead Act, (2) obtain an understanding of the characteristics a business firm needs to possess in order to qualify for Capper-Volstead cooperative membership.

Methods Used

The methods used to accomplish these objectives include (1) review of the development of the Capper-Volstead Act, (2) discussion of the involvement of

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[1]Federal Trade Commission, Bureau of Competition, Staff Report on Agricultural Cooperatives, September 1975, p. 83.

[2]Statement of the Honorable William C. Hungate as quoted in U. S. Congress, House, Committee on the Judiciary, Family Farm Act, Hearings before a subcommittee of the House Committee on the Judiciary on H. R. 11654, 92d. Cong., 2d. sess., 1972, p. 16.

industrial corporations in agricultural production and agricultural cooperatives, and (3) examination of judicial opinions that have discussed the availability of the Capper-Volstead Act's antitrust protection.

Information for this paper was derived through various studies, reports, public documents, and judicial opinions discussing the Capper-Volstead Act, agricultural cooperatives, or corporate involvement in agriculture.

CHAPTER II

DEVELOPMENT OF ANTITRUST LEGISLATION AND THE CAPPER-VOLSTEAD ACT

To better understand the meaning of the Capper-Volstead Act, a brief review of the origin of antitrust legislation is in order. This review of the development of antitrust legislation puts into focus the significance of the exemption provided by the Capper-Volstead Act and also aids in interpreting the intent of Congress in enacting the Act.

Sherman Antitrust Act

During the latter half of the nineteenth century, certain business groups held an undesirable advantage in market power over the small independent businessman and farmer.[1] These groups often used this market power advantage aggressively to further enhance their interests. "The unruly times offered opportunity to the swashbuckling captains of industry, whose ways were direct, ruthless, and not yet covered over by the surface amenities of a later age."[2] This type of business environment created a feeling in many that some kind of restraining legislation was needed to control these "ruthless" industrial giants

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[1]Torgerson has described market power as follows: "[T]he ability--through managerial expertise and pressure--to obtain and maintain control over one or several factors influencing prices and income including the willful restriction of supply in proportion to demand to maintain or enlarge the value of business assets." Randall E. Torgerson, "An Overall Assessment of Cooperative Market Power," Agricultural Cooperatives and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, (St. Louis, Mo.: June 6-8, 1977), p. 265.

[2]William G. Shepard, (ed.), Readings in Public Policies Toward Business, (Homewood, Ill.: Richard D. Irwin, 1975), p. 45.

Farmers, who as a group, were suffering from the market power abuse of the industrial giants as much as anybody, were a primary force behind the development of some type of antitrust legislation. They wanted to restore more competition to the economy by putting some kind of control on the "trusts" that were becoming prominent. This desire of farmers was generally shared by the public, and Congress eventually adopted the United States' first real piece of antitrust legislation in 1890 -- the Sherman Antitrust Act.[1] However, the Sherman Act soon became more of a hindrance than a help to farmers, because thei newly popular farmer marketing cooperatives were easily adjudged as being in restraint of trade.[2]

Although agricultural marketing cooperatives were still in their infancy at the time the Sherman Act was made law, some thought had been given by the Act's framers as to what effect the new legislation would have on cooperatives. In fact, an amendment had been proposed stating that the Act was not construed to prohibit "any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture with the view of enhancing the price of their own agricultural or horticultural products."[3] However, this amendment was eventually dropped, and as a result, the Sherman Act made no

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[1]Section 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 declared to be illegal. 15 U.S.C. 1 (1970).

Section 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, shal be deemed guilty of a felony. 15 U.S.C. 2 (1970).

[2]Ewell Roy, Cooperatives: Today and Tomorrow (Danville, Ill.: The Interstate Printers and Publishers, 1969), p. 214.

[3]Joseph G. Knapp, Capper-Volstead Impact on Cooperative Structure, Information 97, Farmer Cooperative Service, U. S. Department of Agriculture, February 1975, p. 1-2.

mention of cooperatives at all. This is significant in that a void was left to be later filled by the Clayton and Capper-Volstead Acts.

Farmers soon discovered that the Sherman Act was not only jeopardizing their marketing cooperatives, but was also proving to be of little help in alleviating the market power imbalance characteristic of the business economy. Specifically, Section 1 of the Act, which prohibits conspiracies in restraint of trade, was falling short of its optimum benefit to farmers. In interpreting Section 1, the courts repeatedly held that only unreasonable restraints were prohibited. This judicial interpretation was soon coined the "rule of reason."[1] The courts tended to attach more importance to the techniques of a particular restraint of trade, and whether or not these techniques were unreasonable, than they did to the problem of monopoly power which more concerned farmers.[2] Action and intent, not size, was being questioned.

Clayton Act

Despite their precarious standing under the Sherman Act, agricultural cooperatives became increasingly popular around the turn of the century. Farmers were finding that cooperatives provided a somewhat viable means by which they could gain a counter-vailing power to the market power already possessed by big business. Such a counter-vailing power was needed as the Sherman Act had proved to be largely ineffective in breaking up the large business associations that were prevalent during this time. However, because of their uncertain

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[1]U. S., Department of Agriculture, Antitrust Laws, Information 100, Farmer Cooperative Service, May 1976, p. 277.

[2]Knapp, p. 2.

status under the Sherman Act, cooperatives often found themselves defendants in antitrust suits.[1]

To remedy the precarious standing of cooperatives, agricultural leaders became more and more interested in securing a positive statement which would exempt farmer-owned associations from the Sherman Act.[2] Such a statement was forthcoming in 1914, tucked away in a piece of legislation largely solicited by labor interests -- the Clayton Act. Section 6 of the Clayton Act specified that a certain type of agricultural association would not be regarded as a combination in restraint of trade per se. Specifically, Section 6 provided that

> nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for a 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.[3]

This provision indicated a desire by Congress to protect agricultural cooperative from the antitrust laws, but since a large number of cooperatives had capital stock, and many others were interested in organizing with stock, further legislation was needed to clarify the standing of the growing cooperative movement.[4]

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[1]Joe Hlavecek and Tim Troll, "Antitrust: Farmers, Cooperatives and Agribusiness; Not Everything is 'Ho' 'Ho' 'Ho' in the Valley of the Jolly Green Giants," Unpublished Research Paper, Washburn University, 1978, p. 16.

[2]Statement of Edwin Nourse as quoted in Knapp, p. 3.

[3]15 U.S.C. 17 (1970).

[4]Roy, p. 215.

Capper-Volstead Act

Agricultural Situation

The agricultural economy during the years immediately following World War I was in a general state of depression. In fact, farm prices had failed to keep pace with the increasing price levels of the economy as a whole since the pre-war year of 1913. As the whole economy leveled out after the war, due to what President Harding termed "hardships of readjustment caused by war-time excesses,"[1] wholesale farm prices led the drop. From June 1920 to December 1921 alone, the index of farm prices dropped 119 points.[2] Similar to today, farmers were complaining bitterly about not being able to cover their costs of production. Not only had they seen their income steadily drop relative to that received by other workers from 1909 through 1920, but farmers' problems were compounded by the fact that they were becoming increasingly dependent on purchased inputs as machinery began to displace family labor.

Unfortunately, agriculture, being atomistic in nature, had little power to correct its problems. Farmers were in the position of having to individually sell to, and buy from, business firms much larger than themselves. As a result, they were essentially losing control of farming. Middlemen were taking advantage of the farmer, who typically had little access to market information, by selling the farmer supplies when prices were high, and buying his produce when

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[1]U. S., Department of Justice, Milk Marketing, A Report to the Task Group of Antitrust Immunities, Washington, D. C., January 1977, p. 34-35.

[2]J. Phil Campbell, "Cooperatives: A Necessary Family Farm Marketing Tool," News for Farmer Cooperatives, July 1974, p. 14.

prices were low.[1] Senator Volstead noted the conditions under which farmers had to sell:

> Whenever a farmer seeks to sell his products, he meets in the marketplace 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.[2]

Representative Barkley noted that the farmer was being pinched just as hard when he bought supplies:

> No farmer can compete alone with the conditions that surround him. We all know that it is economically impossible for any individual 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.[3]

Cooperative Situation

As their economic situation deteriorated, farmers, confronted by large corporate organizations on every side, became increasingly aware that their economic salvation depended upon their ability to fashion counterforms of organization adapted to their own needs.[4] Cooperatives were a logical vehicle through which to pursue a countervailing power, and, indeed, cooperatives were becoming a more viable force in the United States business structure during the first two decades of the twentieth century.

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[1]Ibid.

[2]H. R. Rep. No. 24, 67th Cong., 1st sess., 1921, as cited in Federal Trade Commission, p. 75.

[3]59 Cong. Rec. 8034 (1920) as cited in Department of Justice, p. 36.

[4]Knapp, p. 3.

From 1900 to 1920, there was a rapid expansion of marketing, purchasing, and service cooperatives throughout the United States. By 1920, there were nearly 14,000 cooperative associations in existence.[1] It was during this period that a large number of livestock shipping associations and cooperative grain elevators were established. Often, these types of services did not exist in the local community, so farmers frequently decided to furnish them through their own organizations.[2] Other cooperatives were being formed during this time strictly for price enhancing purposes. (e.g. The Kansas Wheat Growers Association, The Farmers Union Livestock Cooperative.[3]) Although most of the cooperatives at this time were local associations, a few large-scale federated and centralized associations had appeared.[4] (e.g. The Farmer's Cooperative Commission Company.[5])

Unfortunately, the growth cooperatives experienced during these early years of the twentieth century was tempered by the fact that the very right of farmers to act together remained in question. The susceptibility of cooperative associations to federal antitrust prosecution remained a concern to observers of the agricultural scene who viewed cooperatives as a means of bettering the farm situation.[6]

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[1]Marvin A. Shaars, Cooperatives, Principles and Practices, Cooperative Extension Programs, University of Wisconsin, Madison, Wisconsin, 1970, p. 78.

[2]Randall E. Torgerson, Basics of Farmer Cooperatives, Manual 81, Extension Division, University of Missouri-Columbia, Columbia, Missouri, February 1972, p. 16.

[3]Ralph Snyder, We Kansas Farmers: Development of Farm Organizations and Cooperative Associations in Kansas (F.M. Steves and Sons, 1953), p. 17, 25.

[4]Martin A. Abrahamson, Cooperative Business Enterprise (New York: McGraw-Hill Book Co., 1976), p. 94.

[5]Snyder, p. 65.

[6]Department of Justice, p. 32.

Legislative History

The uncertainty surroumding the legal footing of cooperatives was not going entirely unnoticed during the post-war years. Cooperative leaders were initiating a push for some kind of new enabling legislation clarifying the status of cooperatives. The National Milk Producers' Federation, in 1917, proposed a new law exempting agricultural cooperatives from the antitrust laws.

> 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.[1]

This resolution spurred further discussion throughout the agricultural sector on the need for an amendment to the Clayton Act.

By 1919, a bill had been drafted for submittal to the Senate, exempting cooperatives, corporate or otherwise, from antitrust provisions. This bill was closely scrutinized by Congress, and was to experience several major revisions over the next couple of years. The bill, named for its sponsors, Senator Capper of Kansas and Representative Volstead of Minnesota, became known as the Capper-Volstead bill.

The purpose of the Capper-Volstead bill was to provide relief from antitrust prosecution for cooperatives organized with capital stock, and to generally provide a means through which farmers could improve their bargaining situation. As Representative Volstead noted:

> The objections made to these organizations [cooperatives] 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

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[1] Knapp, p. 4-5.

> 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.[1]

Representative Hersman stated that

> this bill is intended to legalize farmers' cooperative associations having capital stock. The provision of the Clayton Act which permitted cooperative marketing among farmers can not under present business methods be fully taken advantage of, and this bill is framed in order to meet the situation that the farmers of this Nation are confronted with through the evolution of modern business methods.[2]

Senator Capper felt that the bill

> 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.[3]

Despite the recognized need for some added cooperative legislation, Congress was in no hurry to pass the Capper-Volstead bill. By 1921, conditions on the farm had become so critical that Congress created a Joint Commission of Agricultural Inquiry. This commission, among other things, recommended legislation to strengthen the legal position of cooperative marketing associations.[4] In January 1922, the Secretary of Agriculture organized a National Agricultural Conference which brought together business leaders from all sectors of the economy. President Harding, in addressing this conference, gave his support to some type of enabling legislation for cooperatives -- "American farmers are

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[1]61 Cong. Rec. 1033 (1921) as cited in U.S.D.A., p. 295-296.

[2]59 Cong. Rec. 8025 (1920) as cited in Department of Justice, p. 51.

[3]62 Cong. Rec. 2057, 2059 (1922) as cited in U.S.D.A., p. 296.

[4]Campbell, p. 14.

asking for, and it should be possible to afford them, ample provision of law under which they may carry on in a cooperative fashion those business operations which lend themselves to that method."[1] A report formally adopted by the conference stated that

> collective action should be made available to those engaged in agriculture to the same extent as [it is] available to those engaged in other industries. We . . . urge that Congress promptly enact affirmative legislation which will permit farmers to act together in associations, corporate or otherwise, with or without capital stock.[2]

This type of public support for further cooperative legislation prodded Congress to eventually pass the Capper-Volstead bill in February 1922. Even though it took Congress nearly three years to pass the bill into law after it was first introduced, such delay might have really been beneficial to farmers because the final product was certainly no piece of hasty legislation full of inconsistencies. Knapp noted that "[t]he legislative history of the Capper-Volstead Act makes it clear that it was not pushed through Congress without careful study and much debate. Almost every question that has subsequently arisen with reference to the application of the Act was examined by Congress."[3]

What does the Capper-Volstead Act really accomplish? It essentially exempts farmer marketing cooperatives from the antitrust laws in the sense that a marketing cooperative's mere existance is not an antitrust violation per se. Volkin observes that the Act contains two key provisions: (1) It permits farmers to get together to collectively market their products which, in the absence of such an enabling provision, could result in antitrust action against

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[1]Knapp, p. 11.

[2]Ibid.

[3]Ibid.

them; (2) It protects the general public against the possibility of undue price enhancement as a result of any monopoly position that a group of producers could legally achieve by getting together.[1] It is the first provision with which this paper is primarily concerned.

[1]David Volkin, "Keys to Understanding Capper-Volstead," News for Farmer Cooperatives, July 1974, p. 4-5.

CHAPTER III

CORPORATE PRESENCE IN AGRICULTURAL PRODUCTION AND COOPERATIVES

Agricultural Production

At the time the Capper-Volstead Act was enacted in 1922, agricultural production was nearly exclusively taking place on the so-called family farm. In fact, one purpose of the Act was to protect the small, family farmer. Senator Kellogg, a leading spokesman for Capper-Volstead while it was still a bill, stated that the legislation was designed to encourage the family farmer "in his ownership, in the occupation of his farm, and in the cultivation of his own land."[1] However, the structure of agriculture has changed appreciably since the Act was enacted, to where agricultural products are not only being produced by the family farmer but also by huge corporate conglomerates. The following is a brief look at the development and magnitude of corporate involvement in United States agriculture.

Agriculture in the United States has long been dominated by the so-called family farm. The family farm is a characteristic of what Breimyer and Barr has termed "dispersed farming".

> A dispersed system of farm production and marketing by definition has many proprietary units. . . . The proprietary status of farmers in a dispersed system is usually related closely to an open market system. This does not rule out all contractual marketing, but it excludes contractual arrangements that

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[1] 62 Cong. Rec. 2051 (1922).

seriously compromise the managerial independence of the farmer.[1]

Breimyer and Barr feel that the presence of a dispersed organizational system has been the result of abundant land and the preferences of society. "Land disposal policies of the government encouraged small holdings by many people. But the system was also adopted because farmers wanted it and because the public - which always holds a potential veto power over policies for agriculture - either favored it or acquiesced in it."[2] The dispersed system received considerable national policy support over the years, and the family farm became an institution of our society. Policy makers felt that keeping managerial control in the hands of many small proprietary operators was the best way of preserving a viable open market system.

However, by the middle of the twentieth century, there had arisen several developments which contributed to pressures for organizational changes in agriculture. These developments included: (1) the increasing technical complexity of farming; (2) the economies associated with volume operations; (3) the growing scarcity of good farmland; and (4) the growing pressures being put on farmers to become a subsidiary unit in large business organizations.[3] Such developments have encouraged a movement towards a more concentrated organizational system in agriculture. This increased concentration can take several forms. It can result in (1) fewer but larger family farms; (2) direct

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[1]Harold F. Breimyer and Wallace Barr, "Issues in Concentration Versus Dispersion," Who Will Control U. S. Agriculture?, North Central Regional Extension Publication 32, University of Illinois, Urbana, Ill., August 1972, p. 15.

[2]Ibid.

[3]Ibid, p. 16-17.

industrial corporate involvement in farming; or (3) some form of contractual farm production and marketing system. For purposes of analyzing "farmers" under the Capper-Volstead Act, the latter two are of primary interest, as family farmers were probably intended beneficiaries of the Act.

It should be emphasized at this point that family farmers probably do not jeopardize their ability to be Capper-Volstead cooperative members simply by incorporating. The family farm that incorporates still conducts its business operations much in the same manner as its proprietary and partnership counterparts. Incorporation in itself has no effect on the size or market power of the family farm. As Coffman noted: "Family owned and controlled corporations are typically larger-than-average farms and ranches that have adopted the corporate form of business organization. To most observers, the nature and purpose of the business does not appear much different than the partnership or sole proprietorship that existed before incorporation."[1]

Since it is size, not type of business organization, that makes the status of some agricultural producers suspect under the Capper-Volstead Act, as we shall see later, the following discussion on corporate involvement in agriculture is primarily concerned with the production activities of "industrial corporations". An industrial corporation, for the purposes of this paper, is loosely defined as any corporation not deriving the greater part of its income from the sale of raw agricultural products. This definition is workable only because there are few corporations of even moderate size that derive the principal part of their income from the sale of unprocessed agricultural products. The term "industrial corporation" is intended only to convey a sense of meaning.

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[1]George Coffman, Corporations With Farming Operations, No. 209, Economic Research Service, U. S. Department of Agriculture, June 1971, p. 5.

Direct Corporate Involvement

Direct participation in agricultural production by industrial corporations has been an issue that has generated considerable discussion and speculation. A supposedly rapid growing corporate involvement has created alarm in many sectors of society. There, indeed, has been some apparent increase in corporat farming activities in recent years. However, it has been difficult to document the actual extent of industrial corporate activity in agricultural production as such firms often downplay their farming activities. The data that are avail able indicate that industrial corporate farm production constitutes only a smal part of total United States farm production. Nevertheless, there are numerous industrial corporations that seem to find the production of agricultural commodities an attractive venture.

A 1968 United States Department of Agriculture survey observed that farmin corporations, including family farm corporations, made up about 1.0 percent of all commercial farms, controlled about 7.0 percent of United States farmland, and were responsible for about 8.0 percent of total sales of all farm products. The 1974 Census of Agriculture indicates corporate farming activity is on the increase. It reported that corporations made up 1.7 percent of all farms, controlled 10.7 percent of United States farmland, and were responsible for 17. percent of farm sales.[2] Neither study isolated the farming activities of publicly held corporations although the U.S.D.A. study noted that 20 percent of the corporations it surveyed were owned and controlled by other corporations or stockholder groups rather than the family or individual. This study also noted

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[1]Ibid., p. IV.

[2]U. S., Department of Commerce, 1974 Census of Agriculture, Volume II, Statistics by Subject, Part 3: Tenure, Type of Organization, Contracts, Operator Characteristics, Principal Occupation, September 1978, p. II-4.

that the publicly held firms tended to have larger farming operations than the individual or family controlled corporations. Although critics of corporate farm production challenge the accuracy of such figures,[1] it appears that industrial corporate farm production remains a small part of total United States farm production.

The farming enterprises of larger industrial corporations are generally concentrated in commodities that make them conducive to large-scale operations under a highly coordinated structure. Such characteristics include intensive resource use, perishability, and a high degree of uniformity.[2] Corporate farms have traditionally proved most successful in areas where climatic conditions are stable, or where livestock production can be controlled.[3] (i.e. Southwestern States.) Fruit, vegetables, and livestock production have been the most common enterprises among industrial corporate firms.[4]

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[1]One study concluded that the U.S.D.A. underestimated the total number of acres owned by corporations by 37 percent, acres rented by 269 percent, number of cattle fed by 80 percent, number of milk cows by 54 percent, and number of sows by 37 percent. It has also been suggested that the U.S.D.A. overestimated the percentage of all incorporated farm operations interpreted as incorporated family farms. Statement of Richard Rodefeld as quoted in Family Farm Act, p. 61.

[2]Donn A. Reimond, Farming and Agribusiness Activities of Large Multi-unit Firms, No. 591, Economic Research Service, U. S. Department of Agriculture, March 1975, p. VI.

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Commodity	Percent of Commodity Controlled by Corporate Producers	A Leading Corporate Producer
Fresh Vegetables	51	Tenneco
Processing Vegetables	95	Del Monte
Potatoes	70	French's
Citrus Fruits	85	Coca-Cola
Seed Crops	80	Purex
Broilers	97	Pillsbury

Statement of Jim Hightower as quoted in U. S. Congress, House, Committee of the Judiciary, Food Price Investigation, Hearings before a subcommittee of the House Committee on the Judiciary, 93d Cong., 1st sess., 1973.

In conclusion, it appears that the industrial corporate sector plays only a minor role in the direct production of agricultural commodities today. Its immediate threat to dispersed agriculture probably is not as great as many perceive. Still, it should be remembered, that only a relatively small number of industrial corporations control over half of the assets used in manufacturing in the United States. Unfortunately, there is always the possibility that, without controls, corporate firms may some day have the potential to approach a similar concentration of economic power in agriculture.[1] Indeed, one critic of the industrial corporation being on the farm has noted that already "Sunday dinner just is not what it used to be: the turkey is from Greyhound and the ham is from ITT; the fresh vegetable salad is from Tenneco with lettuce from Dow Chemical; potatoes by Boeing are placed alongside a roast from John Hancock Mutual Life; and there are after dinner almonds from Getty Oil."[2] In light of this potential threat to the family farm, so highly valued by our society, several states have enacted laws prohibiting publicly owned corporations from getting involved in certain agricultural practices.[3] (e.g. Kansas law prohibits large publicly owned corporations from participating in the production of wheat corn, oats, grain sorghum, rye, potatoes, or the milking of cows.[4])

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[1]Leonard R. Kyle, W. B. Sundquist, and Harold D. Guither, "Who Controls Agriculture Now?--The Trends Underway," Who Will Control U.S. Agriculture? North Central Regional Extension Publication 32, University of Illinois, Urbana, Ill., August 1972, p. 3.

[2]Statement of Jim Hightower as quoted in Food Price Investigation, p. 357.

[3]Coffman, Corporations Having Agricultural Operations, p. 3.

[4]K.S.A. 17-5901.

Contract Production

A form of industrial corporate involvement in agricultural production other than direct is through the use of contracts. A contractual farm production and marketing system is a hybrid between a completely dispersed system and a corporate "concentrated" structure.[1] This is a system where much of the responsibility of management can be shifted from farmers to corporate firms. Some or all of the risk, including both price and production risk, can be shifted to the contracting corporate firm as well.

Contract and vertically integrated production has experienced moderate growth in recent years. From 1960 to 1970 such production increased form 19.0 to 22.0 percent of total agricultural output.[2] Commodities where production management or resource providing contracts are most common tend to be commodities where no spot market exists for the unprocessed commodity. Broilers, sugarbeets, and vegetables for processing are all commodities whose production is largely controlled by contracts.[3] With these commodities, a farmer's main access to a market outlet is through a forward contract. (i.e. Without a contract, farmers raising broilers could not find a market.)

Basically, there are two general types of contracts -- marketing and production. They differ significantly in the amount of control the corporation possesses over the actual production of the commodity.

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[1]Breimyer and Barr, p. 18.

[2]Kyle, p. 8.

[3]Thomas L. Sporleder and David L. Holder, "Vertical Coordination Through Forward Contracting," Marketing Alternatives for Agriculture, Cooperative Extension, New York State College of Agriculture and Life Sciences, Cornell University, Ithaca, N.Y., 1977, No. 3.

The marketing contract is much like a forward sale. Under this type of contract, the farmer agrees to market specified quantities of his production in the future at a price fixed either at the time of the contract or later.[1] With this type of arrangement, the farmer retains most of the privileges and risks associated with production. The only real risk being delegated to the corporate contractor is that of market price fluctuation. Marketing contracts are generally favorable both to the producer and the contractor. The producer is benefited in that he is assured of a market at the time of harvest and a known price in advance of harvest. The incentives to the contractor, usually a processor, for entering such an arrangement may include quantity or quality assurances or fixing a price prior to harvest.[2] Such contracts have generally been completely satisfactory to the large percentage of participating farmers.

The second general type of contract is the production contract. Such contracts are signed prior to production, with the contracting corporate firm retaining the large share of managerial control as well as risk. It is this type of contract that has generated concern among some observers that farmers are losing control of production.[3] Often, the contractor retains ownership of the commodity with the farmer supplying little more than land or labor. Rhodes notes that in the case of broilers and some fruits and vegetables, the farmer is really selling the services he performs rather than the commodity he grows.[4] Consequently, he becomes little more than a paid employee or worker.

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[1]James V. Rhodes, "Policies Affecting Access to Markets," Who Will Control U. S. Agriculture?, North Central Regional Extension Publication 32, University of Illinois, Urbana, Ill., August 1972, p. 39.

[2]Sporlender and Holder, No. 3.

[3]Linda Kravitz, Who's Minding the Co-op?, Agribusiness Accountability Project, Washington D. C., March 1974, p. 42.

[4]Rhodes, p. 38

The incentives for the corporate contractor to enter production contracts mostly revolve around the reduced costs of production associated with coordination and control of two or more levels in the total production-servicing-marketing complex by a single business organization.[1] In other words, vertical integration incentives are the usual motive for contractors to enter production contracts. Logically, it is firms that are involved in the processing of raw agricultural products that have shown the most interest in production contracts. Farmer incentives for entering such contracts primarily concern market access. As noted earlier, without such arrangements, farmers producing certain products would have no market for their produce.[2]

Cooperatives

The Capper-Volstead Act essentially was enabling legislation for agricultural marketing cooperatives. Agricultural producers are allowed to collectively process and market their products through a cooperative association without being in violation of the Sherman or Clayton Acts per se. As noted earlier, such a privilege is one that is attractive to all types of agricultural producers, including industrial corporate producers. However, the question of whether these types of corporations can legitimately participate as active cooperative members, protected by the Capper-Volstead Act, is one of little substance unless some industrial corporate participation in cooperatives is actually taking place.

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[1]William E. Black and James E. Haskell, "Vertical Integration Through Ownership," Marketing Alternatives for Agriculture, Coopertive Extension, New York State College of Agriculture and Life Sciences, Cornell University, Ithaca, N.Y., 1977, No. 7.

[2]Sporlender and Holder, No. 3.

Unfortunately, charges of industrial corporate involvement in cooperatives have often been made in an environment lacking factual information. There has been a noticeable dearth of study attempting to document the actual extent of such corporate involvement. Schneider, Ward and Lopez have provided a recent study that somewhat fills this void.[1] Their study surveyed over 500 randomly selected cooperatives intended to represent the over 7,000 agricultural cooperatives existing in the United States in 1977. Over 90 percent of the responding cooperatives were marketing cooperatives, which is the type of cooperative the Capper-Volstead Act is concerned with.

The study separately analyzed the involvement of publicly held corporations and closely held corporations. The industrial corporation, whose status under the Capper-Volstead Act is questionable, is usually publicly held. Closely held firms have some sort of limitation on who can become a shareholder, and although some industrial corporations are so organized, most of the closely held corporations reported in this study were probably family farm operations. Therefore, the data on publicly held corporations probably give a more accurate account of the participation of industrial corporations in cooperatives.

The results of the study indicated that 2.8 percent of the responding marketing cooperatives reported having publicly held corporations as members. These publicly held corporations constituted .03 percent of total marketing cooperative membership and .04 percent of the membership of just those

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[1]Vernon E. Schneider, Clement E. Ward, and Ramon Lopez, Corporation Involvement in Agricultural Cooperatives, Research Bulletin (Preliminary), Texas Agricultural Experiment Station, February 1978.

cooperatives reporting having these firms as members.[1] Schneider reports[2] that the commodity group found to have had the highest percentage of publicly held corporate members was grain. In addition, it was noted that the large majority of cooperatives having publicly held corporate membership was located in the Midwest and along the West Coast. The survey made a separate analysis of the largest 120 responding cooperatives. This analysis showed that these large-volume cooperatives had a higher frequency of publicly held corporate patronage than their small-volume counterparts.

Schneider concluded that in terms of membership numbers, corporate involvement in marketing cooperatives remains relatively minor. He notes that "[w]hile a relatively few publicly held corporations are members of cooperatives and serve on cooperative boards, the essential financial and management control remains in the hands of agricultural producers."[3] However, although this study does provide data on corporate membership, the study is limited in that it fails to provide data on the degree of corporate participation in cooperatives. As a result, the actual extent to which industrial corporations are making use of cooperatives remains uncertain.

Finally, even though industrial corporate involvement in cooperatives appears to be relatively minor, the issue of whether industrial corporations are entitled to fully participate in cooperatives remains important. It should be noted that corporate involvement in only one cooperative may lead

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[1]Schneider, Ward, and Lopez, p. 25.

[2]Vernon E. Scneider, "Corporate Involvement in Cooperatives", Agricultural Cooperatives and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, (St. Louis, Mo.: June 6-8, 1977), p. 149.

[3]Ibid., p. 155.

TABLE I

PUBLICLY HELD CORPORATE INVOLVMENT IN MARKETING COOPERATIVES
SURVEYED BY SCHNEIDER, WARD, AND LOPEZ

Commodity	Co-ops Responding	Co-ops Having Pulicly Held Members		Total Members	Publicly Held Corporation Members	
		Number	Percent		Number	Percent of Total Members
Cotton	102	2	2.0	15,490	6	.04
Dairy	95	0		26,505	0	
Fruits and Vegetables	112	5	4.5	60,957	10	.02
Grain	49	5	10.2	54,281	64	.12
Livestock	37	1	2.7	48,008	2	.00
Poultry	21	0		6,187	0	
Rice	40	0		16,397	0	
Sugar	35	0		9,385	0	
Other Commodities	47	2	4.3	67,485	5	.01
TOTALS	538	15	2.8	304,696	87	.03

Source: Schneider, Ward, and Lopez, p. 25.

to undesirable marketing consequences in a local market or even an industry.[1] Also, if industrial corporations are given full access to cooperatives and Capper-Volstead protection today, it is certain that tomorrow will bring increased corporate involvement in cooperatives. As Knutson noted: "Lest I be misinterpreted, corporate involvement in cooperatives is currently minimal. I am instead looking to the future. The patterns for corporate involvement in agriculture are set. The patterns for cooperatives to deal with this involvement must also be set."[2]

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[1]Rhodes, p. 38.

[2]Knutson, p. 148.

CHAPTER IV

JUDICIAL INTERPRETATION OF "PERSON" AND "FARMER" PRIOR TO 1972

Laws must of necessity consist of words, and, of course, words, especially in the English language, can have many different meanings. Often, differences in the possible meaning of a word can be extreme. However, it is important to any viable legal system that its laws have some degree of uniformity in their meaning to the public. Without such a uniform meaning, the intended authorization or prohibition of a particular law would likely meet with little success.

The responsibility of giving uniform meaning to laws falls upon the courts. The courts "interpret" a law every time they apply it to a particular fact situation. After being so applied, the words of law gain meaning. Two tests that are often relied upon by the courts in interpreting the words of a particular statute involve "plain-meaning" and "congressional intent". The "plain-meaning" test gives the words of a statute their common and generally accepted meaning, if such exists. The "congressional intent" test, on the other hand, looks at the type of behavior the law's makers were attempting to encourage and gives the words of the statute the meaning that best dictates such behavior.

Of course, different courts can interpret the words of a law differently, even when applying the same test. Consequently, something more is required to provide the uniformity needed for an equitable administration of the law. The stare decisis doctrine has been the traditional provider of such uniformity in the United States' legal system. This doctrine involves a policy of

following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice.[1] In layman's terms, such a policy puts a great deal of emphasis on precedent. A court will apply an earlier judicial interpretation of the words of a statute to any similar fact situation before it, unless the earlier interpretation clearly contravenes justice. Of course, the United States Supreme Court is the final authority on any disputed decisions. The significance of the stare decisis doctrine, for the purposes of this paper, is that a judicial interpretation, especially one by the United States Supreme Court, handed down today can have ramifications far down the road.

The Capper-Volstead Act, like other statutes, has been molded through judicial interpretation. However, during the first fifty years of the Act's life, little attention was given by the courts to the question of who can benefit from Capper-Volstead cooperative membership as "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." Although the lower federal courts had given some attention to the scope of the availability of the Act's antitrust exemption through the years, the Supreme Court declined to take up the issue of what is Capper-Volstead "farmer" until 1978.

Elm Spring Farm

The first significant judicial interpretation as to who can qualify for Capper-Volstead protection came in 1941 in United States v. Elm Spring Farm, Inc.[2] A federal district court made it clear that one has to generate or

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[1]Webster's Third New International Dictionary, 1977 ed., s. v. "stare decisis."

[2]United States v. Elm Spring Farm, Inc., 38 F. Supp. 508 (D. Mass. 1941).

produce agricultural commodities in order to have Capper-Volstead protection. Simply holding title to the product was held not to be sufficient involvement in agricultural production to be a "farmer".

The facts of Elm Spring Farm involved a new cooperative association which was organized by the stockholders of a previously existing corporation in the business of handling milk. The new cooperative association took title to cattle of farmer-producers in return for mortgages and stock in the new corporation. However, the cattle were left in the possession of the farmers while the new association simply continued to handle the milk for producers.

The newly formed association, having both producers and non-producers as stockholders, sought Capper-Volstead protection by claiming it was a producer as it held title to the dairy cows. However, the court disagreed. The court found the issue before it to be as follows: "[D]oes a corporate handler of milk become a producer by simply forming a new corporation [a cooperative], taking title to the farmer producer's cattle in the cooperative name, paying therefore, partly by mortgage and partly by issuance of stock, and designating the former producers as herdsmen?"[1] The court concluded that it does not.

> In the broad conception of the word, a 'producer' is anyone who produces, generates, or brings forth an article, and, in the case of agricultural products, is one who grows an article or causes it to appear. In the case of milk, a dairyman, caring for, and feeding a herd of cattle for their milk is a producer. A dairyman who produces milk remains a producer, even though the title to his cows has left him.[2]

Maryland and Virginia Milk Producers

The issue of who can qualify for Capper-Volstead cooperative membership was next dealt with in 1958 by a federal district court in United States v.

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[1]Ibid., p. 511.

[2]Ibid., p. 510.

Maryland and Virginia Milk Producers Association.[1] This case involved an association of milk producers, organized as a cooperative, which was charged with monopolizing interstate trade in supplying milk, and restraining trade by acquiring the assets of a milk retailer. The association claimed it was protected from such charges by the Capper-Volstead Act.

In presenting its case in district court, the government took the position that the words "farmers" and "dairymen" used in the Act should be restricted to natural persons who personally work their farms and derive the major portion of their income from the farm.[2] Although most of the members of the association were natural persons, its membership did contain a few partnerships and corporations. In addition, there were other members who were principally engaged in other occupations besides farming.

The court, however, rejected the government's argument that corporations, partnerships, and others principally engaged in non-farm business could not be "farmers". The court found no basis for such a restricted definition.

> When Congress desired to put a more circumscribed definition on the term "farmer" it did so expressly, as is true of the Bankruptcy Act. The Court, therefore, is of the opinion that 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.[3]

Subsequent analysis of this decision has suggested that the court, in reaching its decision, did not so much look to the Act's legislative history as it did to the impracticality of the government's "natural person" argument. It was probably not the intention of Congress, when adopting the Act, to exclude

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[1]United States v. Maryland and Virginia Milk Producers Association, Inc., 167 F. Supp. 45 (D. D. C. 1958).

[2]Ibid., p. 49.

[3]Ibid.

family farm corporations, family partnerships, or part-time farmers from the Act's protection.

The Supreme Court eventually ruled against Maryland and Virginia Milk Producers on grounds other than the status of its members.[1] The failure of the Supreme Court to challenge the District Court's holding that all of the members of the association were eligible for Capper-Volstead protection, implied that the Supreme Court agreed with such a holding. This decision that corporate producers are not necessarily precluded from the Act's protection set a precedent from which later judicial rulings were molded.

Sunkist

Corporate membership in cooperatives got a further "shot-in-the-arm" in the mid-1960's with Case-Swayne Co., Inc. v. Sunkist Growers, Inc.[2] Sunkist is a large association of citrus producers which is organized as a cooperative. However, its Capper-Volstead exemption status was challenged in 1966 because at that time five percent of its membership consisted of corporate growers, and another fifteen percent consisted of agency packing house associations involved exclusively in the processing, rather than growing, of citrus.

The Ninth Circuit Court of Appeals upheld a ruling by a federal district court that Sunkist was organized in conformance with Section One of the Capper-Volstead Act. The Court of Appeals noted that 1 U.S.C. 1 provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies

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[1]Maryland and Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458 (1960).

[2]Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 1966 Trade Cases, p. 83330

associations, firms, partnerships, societies, and joint stock companies, as well as individuals." The Court proceeded to find nothing in the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

The Court also took note of the Supreme Court's silence on the issue of corporate patronage in Maryland and Virginia Milk Producers. "It is clear from the district court's opinion that the corporation [Maryland and Virginia Milk Producers] included corporate powers. It seems likely that this fact would have been considered by the Supreme Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers."[1]

Not only did the Court of Appeals conclude that corporate growers could be legitimate cooperative members, but it also felt that the agency packing house members did not jeopardize Sunkist's Capper-Volstead status. The Court concluded that since these agencies provided a needed marketing function to the growers without participating in either the gain or loss of fruit marketed through Sunkist, the fact that they were members did not destroy the exempt status of the entire association.

The Supreme Court reversed the Court of Appeals decision in 1967 by concluding that Sunkist was not organized in conformance with the Capper-Volstead Act. The Supreme Court determined the issue to be "whether Sunkist is an association of persons engaged in the production of agricultural products as . . . 'fruit growers' within the meaning of the Capper-Volstead Act, not withstanding that certain of its members are not actually growers."[2]

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[1]Ibid., p. 83339.

[2]Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 386 (1967).

The Supreme Court initially noted that the Act itself expressly limits those who can benefit from its protection to producers. "The Act states those whose collective activity is privileged under it; that enumeration is limited in quite specific terms to producers of agricultural products."[1] The Court further observed that the legislative history of the Act illustrates that Congress intended only for producers of agricultural products, and not processors, to be benefited by the legislation. The following exchange involving Senator Kellogg, a principle supporter of the legislation, was noted:

> 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 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 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.[2]

In light of this apparent intent of Congress not to allow processors or packers to have access to the Act's protection, the Court concluded that all members of a cooperative association must be agricultural producers in order for the association to be protected.

Sunkist argued that the membership of the packing houses had no "economic significance". Sunkist based this argument on the fact that if the packing

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[1]Ibid., p. 393.

[2]Ibid., p. 392.

houses had not been actual members of the association, Sunkist still would have been permitted to handle their products as the Act permits a cooperative to deal in the products of non-members. However, the Court rejected this argument by noting that the agencies were voting members and, therefore, participated in the control and policy making of Sunkist. It was felt that "Congress certainly did not intend to allow an organization with such non-producer interests to avail itself of the Capper-Volstead exemptions."[1] Justice Harlan concluded in a separate opinion that "Congress may have excluded non-producers simply because it felt that the benefits to producers from non-producer membership were outweighed by the dangers of admitting non-producer foxes into the cooperative hen roost."[2]

In summary, the Supreme Court's opinion in Sunkist made it clear that only agricultural producers are the intended beneficiaries of the Capper-Volstead Act, and that any association having but one non-producer member is not protected by the Act's antitrust exemption. Again, it can be noted that the Supreme Court failed to address the issue of what is a producer, just as it had in Maryland and Virginia Milk Producers seven years earlier. It was generally concluded that the Court's silence on corporate patronage was tantamount to approval of such patronage in Capper-Volstead cooperatives.[3]

Apparent Contradiction Between Judicial Interpretation and Congressional Intent

It is apparent that judicial interpretation had begun to provide some insight into the availability of the Act's antitrust exemption by 1970. The

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[1]Ibid., p. 395-96.

[2]Ibid., p. 398.

[3]"Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives," 61 Virginia Law Review 341, 357 (1975

Supreme Court had clearly established in Sunkist that only agricultural producers can be protected by the Act. "Producer" had been earlier defined in Elm Spring Farm as one who grows an article or causes it to appear. The argument that the Act's protection be limited to natural persons was rejected in Maryland and Virginia Milk Producers as it was noted that the word "persons" includes corporations and associations, as well as individuals, unless the context of the law indicates otherwise. No such indication was found in the Capper-Volstead Act. In addition, it was determined that one does not have to devote the major portion of his activities to farming to be a "farmer".

It is clear that by 1970, few judicial barriers had been thrown into the pathway of corporate participation in cooperatives. Industrial corporations were generally allowed free access to Capper-Volstead protection, so long as they were producing agricultural products. However, about that time, some commentators began noting that a liberal interpretation as to who can benefit from Capper-Volstead cooperative membership appeared inconsistent with the congressional intent that could be gleaned from the legislative history of the Act. "[Capper-Volstead] authority was granted to powerless small farmers, to enable them to approximate the merchandising or market power held by non-farm corporations. For giant corporations to use Capper-Volstead to augment the considerable power they independently hold is a manifest contradiction, and opens up the real possibility of violating the public interest."[1]

Indeed, the legislative history of the Act does seem to indicate that several leading supporters of the bill understood that only family farms were to be benefited. Senator Kellogg noted that the legislation was needed

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[1]Breimyer and Torgerson, "Farmer Cooperatives - - By Whom and for Whom?", p. 3.

because of the "individualistic nature of the farmer's occupation," and that "our civilization depends on the protection of individual ownership and proprietorship of the soil."[1] In response to a question of whether beneficiaries of the proposed bill must be "persons who produced these things," Senator Kellogg stated that this had always been his understanding.[2] Representative Towner talked in terms of a farmer being "an individual unit. He must manage his own farm. He must have his own home."[3] Senator Walsh, in responding to a question as to whether millers and packers would be able to organize under the Act, stated that "[he did] not believe that the word 'persons' would include corporations."[4] Finally, Senator Capper thought a primary purpose of this bill was to preserve the family farm -- "[e]very statesman deplores the spread of tenantry and insists that best citizenship can be developed only upon the individual system of farm production."[5] In this light, it certainly seems doubtful that industrial corporations were the type of firm Congress was interested in benefiting.

Some observers concluded that industrial corporate participation actually threatened the Act itself. Breimyer felt that "if Capper-Volstead cooperatives are allowed to become a haven where industrial type corporations can hide from antitrust laws, not only will those corporations eventually be sought out and rebuked, but the cooperative system itself could be a co-victim."[6] Knutson

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[1]62 Cong. Rec. 2048-51 (1922).

[2]Ibid.

[3]61 Cong. Rec. 1040 (1921).

[4]62 Cong. Rec. 2121 (1922).

[5]62 Cong. Rec. 2058 (1922).

[6]Breimyer and Torgerson, "Farmer Cooperatives - - By Whom and for Whom?", p. 3.

concluded that "once agribusiness corporations come under the shelter of today's Capper-Volstead Act, it is only a matter of time until the Act itself is either repealed or so severely restricted that its usefulness to family farmers is severely limited."[1] This type of sentiment makes it apparent that not everyone was enchanted with the courts' liberal interpretation as to who could benefit from Capper-Volstead protection.

Holly Farms

It was in this environment of increased criticism being directed at industrial corporate participation in cooperatives, that Holly Farms Poultry Industries petitioned the Antitrust Division of the Department of Justice for an advisory opinion under the Business Review Procedure.[2] Holly, an integrated producer of broilers who used independent contract growers, sought an opinion as to whether or not it was engaged in the "production of agricultural products and thus entitled to the limited exemption provided by the Act. The Department of Justice responded with an advisory letter in 1971.

This advisory letter stated that the Department did not consider the broilers produced on farms neither owned nor operated by Holly to be farm production by Holly. The Department felt that the inherent risks of production were substantially on the contract growers and that, therefore, this part of Holly's production did not qualify it as "[a person] engaged in the production

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[1]Knutson, p. 246.

[2]Holly Farms Poultry Industries, Inc. v. Kleindienst, 1973 Trade Cases, p. 94380. "Through administrative regulation, 28 C.F.R. 50.6, the Department of Justice is enpowered under the Business Review Procedure to: (1) state its present enforcement intention with respect to the proposed business conduct, (2) decline to pass on the request, or (3) take such other action or position as it considers appropriate."

of agricultural products as [a farmer]."[1] At this same time, the Department of Justice put out a press release stating its view on the status of integrators under the Act. This release stated that the Department felt that in order for integrators using contract growers to maintain their eligibility for membership in Capper-Volstead cooperatives, the contract grower must be relieved of substantially all of the risks traditionally associated with farming.[2]

This Department of Justice "advisory opinion" was important as it constituted an unprecedented look by an administrative body at the status of integrators using production contracts under the Act. This issue had not previously been touched upon in any judicial decision. Certainly, the opinion was not of the type Holly was hoping for, and it set the stage for the issue to be settled in the courts. Shortly thereafter, the government brought a restraint of trade action against another broiler cooperative.

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[1]Ibid.

[2]Ibid.

CHAPTER V

THE NBMA CASE

In 1973, the government brought a restraint of trade action, under Section One of the Sherman Act, against the National Broiler Marketing Association (NBMA). NBMA was organized as a non-profit cooperative whose members included integrator companies. It attempted to take refuge in the antitrust exemption offered by Capper-Volstead by claiming these integrator members qualified as "farmers". The case provided the courts a good opportunity to further define "persons engaged in the production of agricultural products as farmers. . . ." The fact that the NBMA case eventually wound up in the United States Supreme Court on that issue makes it especially significant.

The Broiler Industry and NBMA

To fully appreciate the issue involved in the NBMA case, and the scope of the Supreme Court's decision, a brief look at the organizational structure of the broiler industry would be helpful. The production of ready-to-cook broilers has become highly integrated through production contracts through the years. As feed companies competed for the business of broiler growers, they found that they could gain more market security by contracting with growers to use only their feed for a given period. This arrangement evolved to where some growers would grow on a profit-share plan and, eventually, growers lacking capital began growing on a piece-wage basis. This trend towards integration continued, to where by 1970, virtually all growing broilers were owned by integrators -- feed companies, processors, or combinations of the two.[1] It has bee

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[1]Rhodes, p. 38.

estimated that 97 percent of the broilers being produced in the early 1970's were produced under vertically controlled operations.[1]

The integrated firm in the broiler industry is often a feed company or processor who virtually controls the entire cycle of production. The stages of production include the (1) placement and raising of breeder flocks for the production of eggs for hatching purposes; (2) hatching of eggs and placement of chicks; (3) growth of chicks for a period of seven to nine weeks (grow-out); (4) cooping and hauling of the grown chickens to processing facilities; (5) operation of plants to process the broilers for market.[2] Of course, some firms do not control all of these production stages, but rather are only partially integrated.

The one major operation not usually physically performed by the integrator firms themselves, is the "grow-out" stage, which involves the actual raising of the chicks to maturity.[3] This operation is usually performed through independent contractors, known as growers, who provide facilities and certain services necessary for the care of the birds during this period.[4] Typically, the growers raise the chicks on their own farms and in their own buildings from day-old chicks to finished broiler fryers. The grower usually provides labor, equipment, water, electricity, litter, and fuel. The integrator retains title to

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[1]Kyle, Sundquist and Guither, p. 8.

[2]United States v. National Broiler Marketing Association, 1975 Trade Cases, p. 67219.

[3]United States v. National Broiler Marketing Association, 1977 Trade Cases, p. 71406.

[4]NBMA, 1975 Trade Cases, p. 67219.

the birds and provides feed and veterinary services.[1] In addition, the integrator decides the number and timing of chick placements, the growing conditions, and the age and size at which the birds will be marketed.[2]

In operation, the integrator delivers his day-old chicks to the grower's poultry house, and delivers his manufactured feed to the producer's bins. A representative of the integrator then visits the farm on a regular basis, where he makes suggestions relative to one or another phase of the grow-out stage. (e.g. disease control.) Upon completion of the grow-out cycle, the integrator will send a crew to the grower's farm to catch the birds and transport them to processing plants. The grower is then paid by the integrator for the birds he produced.[3] There is usually some minimum payment guarantee in the contract plus provisions for feed efficiency bonuses.

The consumer demand for broilers tends to be fairly inelastic. Consequently, small changes in supply can produce considerable change in price. In 1970, a group of broiler producers met to discuss what could be done to bring more market stability to the industry. It was determined that producer profits would be increased if the supply of broilers could somehow be kept more in line with demand. As a result, the producers organized a cooperative, NBMA, for the purposes of (1) collecting and disseminating information to members regarding supply and demand, and (2) providing a recommendation on what the "true value"

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[1] NBMA, 1977 Trade Cases, p. 71406.

[2] "Bargaining at Work, Labor Problems, Commodity Marketing Experiences," Farmer Cooperatives, May 1977, p. 12.

[3] Ibid.

of broiler products should be. The cooperative did not actually market its members' products as each member was left to make his own marketing decision.[1]

By 1973, individual farmers and corporations representing more than 50 percent of United States broiler production had become members of NBMA. Its members included such industrial corporations as Cargill, Central Soya, Con-agra Gold Kist, Heublein, F.M.C. Services, Ralston Purina, Tyson, Wilson Co., Pillsbury Co., Marshall Durbin, Pilgrim, Valmac Industries, O. K. Feeds, and Purnell's Pride.[2] All of the members of NBMA, approximately 75 in number, were integrated in that they were involved in more than one stage of production. In addition, they all contracted with independent growers for the raising or grow-out of at least part, and usually a substantial part, of their flocks. At least three of NBMA's members did not own any breeder flock or hatchery, nor operated a grow-out facility.[3]

NBMA in the Courts

As noted earlier, NBMA felt that it was a Capper-Volstead cooperative. It thus claimed that all of its members, integrator corporations included, were eligible for Capper-Volstead protection. The issue thus facing the courts was whether a producer of broilers who employs an independent contractor during the "grow-out" phase qualifies as a "farmer", eligible for Capper-Volstead cooperative membership. There was no dispute that NBMA operated for the mutual

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[1]Eric Thor, "Status of Nontraditional Cooperatives," Agricultural Cooperatives and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, (St. Louis, Mo.: June 6-8, 1977), p. 161.

[2]Ibid., note 2.

[3]National Broiler Marketing Association v United States, S. Ct. Docket No. 77-117, Slip Opinion, June 12, 1978.

benefit of its members and otherwise satisfied the organizational requirements of Section One of the Act.[1]

District Court

The NBMA case was first brought in the United States District Court for the Northern District of Georgia. The District Court first attempted to determine whether broiler integrators are "farmers" by looking to the legislative history of the Act. However, the Court found this not to be of assistance, concluding that "the characteristics necessary to qualify as an actual 'producer' or 'farmer' cannot be adequately discerned from the legislative history. . . . [This] source does not reveal the intent of Congress concerning those involved in various stages of production in addition to manufacturing or who already own the products and do not purchase from a 'farmer'."[2]

Consequently, the District Court turned its attention elsewhere, and its analysis of the problem ultimately revolved around the distribution of risks associated with the various stages of broiler production. The Court concluded that the integrator, not the grower, was shouldering much of the risk.[3] It was noted that the integrator runs the risk of loss from disease or natural disaster and usually makes payments to the grower if the flock is lost in transport. In addition, the integrator bears the risk of price fluctuations in both the feed and ready-to-cook broiler markets. In light of this fact that

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[1] NBMA, 1975 Trade Cases, p. 67220.

[2] Ibid.

[3] The Court observed that approximately 90 percent of the live bird cost was attributable to the input supplied by integrators. It seems the average costs of the building, land, and equipment faced by the grower are only a small part of the total average cost of raising a broiler.

it was the integrator who absorbed most of the production and marketing risk, the District Court concluded, in 1975, that the integrator members of NBMA qualified as "farmers". Therefore, NBMA was found to be protected from the restraint of trade charges being made against it.

Court of Appeals

The government appealed the District Court's decision to the United States Court of Appeals, Fifth Circuit. The Court of Appeals reversed the District Court in 1977, after analyzing the problem in terms of the "plain-meaning" of "farmer" and congressional intent.

The Court of Appeals noted that the words of a statute should be given their ordinary popular meaning unless Congress clearly intended for the words to be interpreted in a more technical sense.[1] The Court concluded that

> [w]e cannot conceive that the ordinary, popular sense of the word 'farmers' would fit broiler integrator companies. The husbandry of the broiler flocks is carried out neither by these firms nor by their employees, but by contract growers. Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership.[2]

Although the Court recognized that the structure of agriculture had changed since 1922 when the Act was enacted, the Court felt that "the ordinary, popular meaning of the word 'farmer' has not. 'Farmer' still means what it meant in 1922 - one who owns or operates a farm."[3]

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[1]"[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Statement of Justice Frankfurter as quoted in NBMA, 1977 Trade Cases, p. 71410.

[2]NBMA, 1977 Trade Cases, p. 71410.

[3]Ibid.

In addition to looking at the "plain-meaning" of "farmer", the Court of Appeals also analyzed the apparent congressional intent behind the Act. The Court concluded that Congress intended to give the small family farmer a means to more equitably compete with larger business organizations. In reaching this conclusion, the Court rejected NBMA's argument that the real purpose of the Capper-Volstead Act was to make farming reliably profitable so as to assure the nation of a stable supply of wholesome food. Under such an interpretation, all producers, regardless of size or degree of integration, would benefit from the Act's protection. Instead, the Court observed that the legislative history of the Act "shows a genuine Congressional concern that the statute not be as broad as a liberal construction of 'production' might allow."[1] Consequently, the Court decided that integrator firms, such as NBMA's members, were probably not the type of business firm Congress intended to protect. As a result, the Court of Appeals determined that NBMA could not benefit from the limited exemption Capper-Volstead provides.

Supreme Court

Noting the importance of the issue as to who or what qualifies as "[a person] engaged in the production of agricultural products as [a farmer]" to the agricultural community and the administration of antitrust laws, the Supreme Court granted certiorari to the NBMA case in 1977.[2]

The Supreme Court initially observed that a common sense reading of the language of the Act, "clearly leads one to conclude that not all persons engaged in the production of agricultural products are entitled to join together

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[1]Ibid., p. 71409, note 15.

[2]National Broiler Marketing Association v. United States, 434 U.S. ____ (1977).

and enjoy the Act's benefits."[1] The Court felt that the words "farmers, planters, ranchmen, dairymen, nut or fruit growers" obviously restricted the broader preceding phrase, "persons engaged in the production of agricultural products."[2] Therefore, the Court phrased the problem before it as follows: "Is a producer of broiler chickens precluded from qualifying as a 'farmer', within the meaning of the Capper-Volstead Act, when it employs an independent contractor to tend the chickens during the 'grow-out' phase from chick to mature chicken?"[3] The Court eventually concluded in 1978, by a 7-2 majority, that such a broiler producer is not a "farmer".

The Court's analysis of the issue revolved around congressional intent. It concluded that the overriding purpose of the Act was to provide a means for individual farmers to more equitably compete with processors and distributors. The Court, in the course of its opinion, rejected the risk-assumption argument urged by NBMA and supported by the District Court and dissent. An analysis of the legislative history of the Act led the Court to conclude that it was not agricultural producers' exposure to risk that led to the passage of the Act, but rather, it was the need of the individual farmer for increased market power. "The congressional debates demonstrated that the Act was meant to aid not the full spectrum of the agricultural sector, but instead to aid those whose economic position rendered them comparatively helpless."[4] Justice Brenna noted in his concurring opinion that at the time the Act was enacted, farming

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[1] NBMA, Slip Opinion, p. 6.

[2] Ibid.

[3] Ibid., p. 1.

[4] Ibid., p. 10.

was not a vertically integrated industry, and that "it was the disparity of power between the units at the respective levels of production that spurred this Congressional action."[1]

The majority buttressed its conclusion that market power considerations were the true concern of the legislature by noting that several attempts were made to pass an amendment to the Capper-Volstead bill that would have provided protection to certain processors who paid growers amounts based on the market price of processed goods. However, this amendment, known as the Phipp's Amendment, which would have exempted such processors as sugar refiners, was repeatedly rejected. From this, it was concluded that "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."[2] Brennan suggests that the legislature felt that such processors are at no market power disadvantage, and that "the purpose of the legislators was to permit only individual economic units working at the farm level to form cooperatives for purposes of jointly processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[3]

The majority ultimately concluded that

> any member of NBMA that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act. The economic role of such a member in the production of broiler chickens is indistinguisable from that of the

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[1]Ibid., Concurring Opinion, p. 2-3.

[2]Ibid., p. 10.

[3]Ibid., Concurring Opinion, p. 4.

> processor that enters into a preplanting contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops.[1]

Since three of NBMA's members neither owned a breeder flock or hatchery, nor operated a grow-out facility, NBMA was found by the Supreme Court not to have Capper-Volstead protection from the antitrust laws. Not all of its members were "farmers."[2]

It is interesting to note that the dissenting opinion of Justice White, with whom Justice Stewart concurred, felt that the majority's comparison of a broiler integrator to a processor of the type discussed in the Phipp's Amendment was unfair because the broiler integrator was much more involved in production. Justice White noted that the Phipp's Amendment attempted to extend protection to manufacturers who, according to preplanting contracts, paid growers a price dependent upon the price received by the manufacturer for the finished commodity. Consequently, the only risk held in common by the Phipps-type processor and actual producers is market price fluctuation. On the other hand, all of NBMA's members bore additional risks (e.g. disease, disaster) besides market price fluctuation because of the nature of their "grow-out" contracts. White concludes that the majority "unwarrantably relies upon the fact that the Senate rejected antitrust immunity for Phipps-processors, who shared only one of these risks, to conclude that parties sharing all these elements of risk should also be denied protection."[3] Obviously, the dissent supported the risk-assumption approach taken by the District Court.

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[1]Ibid., p. 11.

[2]NBMA was forced to dissolve in 1978. Integrated members have been held liable for at least $32 million in damages in various class action suits for conspiring to fix floor selling prices. "Supreme Court Rules Against Broiler Integrators," Turkey World, July-August 1978, p. 6.

[3]NBMA, Slip Opinion, Dissenting Opinion, p. 7-8.

Analysis of the NBMA Decision

Obviously, the question of who can qualify as "[a person] engaged in the production of agricultural products as [a farmer]" is not completely settled by the Supreme Court's decision in the NBMA case. In fact, Baarda has labeled it "a decision that has raised more questions than it answered."[1] However, the decision is of special importance for at least two reasons: (1) The Supreme Court for the first time made known the type of analysis it feels is appropriate in determining who is eligible for the Capper-Volstead exemption; (2) The decision is the first real blockade put into the pathway of corporate participation in cooperatives.

However, before speculating on the possible ramifications of the decision, it must be remembered that the Supreme Court purposely made the decision a limited one. The Court, early in its opinion, noted that in order for NBMA to benefit from the Act's exemption, all of its members must be eligible as "farmers" to act collectively. "It is not enough that the typical member qualify, or even that most of NBMA's members qualify."[2] Consequently, the Court focused its attention on the few members of NBMA who neither owned a breeder flock or hatchery, nor maintained a grow-out facility. These members bought chicks already hatched and immediately placed them with growers, only entering the production line themselves at later processing stages. As is its normal practice, the Supreme Court made its opinion no broader than necessary to solve the problem immediately before it. Consequently, the Court's decision was limited to a finding that broiler integrators neither owning or maintaining a

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[1]James Baarda, "Supreme Court Co-op Decision: Offers Definition of Farmers," Farmer Cooperatives, August 1978, p. 8.

[2]NBMA, Slip Opinion, p. 6.

breeder flock, hatchery, or growing facility are not producers of the type Congress intended to benefit.

Exclusive Use of Congressional Intent as Test

Although the actual decision of the Supreme Court in the NBMA case was limited, it is significant in that it represents the first time the Supreme Court has addressed the issue of what qualifies as a Capper-Volstead "farmer". The decision has certain precedential value in that the Court decided that congressional intent in adopting the Act is of overriding importance. Furthermore, precedential value can be attached to the fact that the Court concluded that the intent of Congress in allowing agricultural producers to participate in collective action was to provide small farmers increased market power, rather than insuring the country of a steady food supply.

Even though the Court's opinion provides no real yardstick by which those involved in agricultural production can be measured to determine if they are "farmers", it is significant that the Court either expressly rejected, or simply passed over, more functional tests that have been suggested. Although the Court did not explicitly state so, it is clear that the Court recognized that the application of some of these other tests would actually encourage integration by corporate processors. Certainly, such a phenomenon could not have been intended by a Congress trying to protect the family farm.

The type of test for determining what is a "farmer" that had previously been most supported, involved assumption of risk. This type of test had been supported by the Department of Justice in its 1971 advisory letter to integrators, the district court in the NBMA case, and the dissenting opinion of the Supreme Court in the NBMA case. In practice, this test would provide Capper-Volstead protection to any business firm shouldering the greater part of the

risk associated with the production and marketing of an unprocessed agricultural commodity.

There are certain easily recognizable advantages to a "risk-assumption" test. Initially, the test has some common-sense appeal. Since those bearing the risks of production are commonly considered "producers", it is logical that those bearing the risks of agricultural production be considered "farmers". Second, the test is appealing in that its application would be relatively uncomplicated. Firms seeking cooperative membership could simply be measured to determine if they bear the requisite amount of production risk that has been established as a minimum. For most agricultural commodity industries, such a determination, even where integration through contracts is prominent, would not be difficult.

However, the Supreme Court expressly rejected the "risk-assumption" test. The Court recognized that such a test can produce results that are inconsistent with the apparent intent of Congress to help out the family farmer. For one thing, application of this test would encourage integration, and, consequently, concentration. Large processing firms would often be more than willing to bear certain production and marketing risks in exchange for the right to collectively set prices. Such a stimulus to increased concentration certainly is of no benefit to the small farmer and may ultimately threaten his existence.

Second, integrated processors sometimes make up the only market to which the farmer can sell. Giving these processors access to farmer cooperatives has been viewed as being analagous to letting the fox into the chicken roost. It is not hard to imagine a cartel of processors, protected by Capper-Volstead, keeping the prices paid to farmers for certain products depressed. Such collective action would seem to make a mockery of the antitrust laws. In rejecting

the "risk-assumption" test, the Supreme Court emphasized that "[c]learly, 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 part of the risk."[1]

Another possible test, which the Supreme Court simply passed over, is a "land ownership" test. Such a test would provide Capper-Volstead protection only to firms owning farmland. However, such a test, too, would encourage integration. Processors large enough to buy land would certainly be provided an incentive to do so. In addition, this test would snub the family farmer who is a tenant. Justice White, in his dissenting opinion, applauds the majority's "studious avoidance" of applying such a test. He notes that "[t]ying antitrust exemption to ownership of land has no legal or economic validity."[2] He further observes that the legislative history of the Act provides no support for such a test: "[One] will search in vain for any discussion of why ownership of land was a logical prerequisite to antitrust exemption for a farmer."[3]

Perhaps the most significant aspect of the Supreme Court's reliance on congressional intent rather than other tests in determining who can benefit from the Act's exemption, is that the Court determined that not all producers should be protected. The following statement of the Court is perhaps the most important part of the opinion in terms of having possible ramifications for cooperatives as a whole: "The Congressional debates demonstrate that the 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.

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[1]Ibid., p. 10.

[2]Ibid., Dissenting Opinion, p. 8.

[3]Ibid., Dissenting Opinion, p. 10.

It was very definitely special interest legislation."[1] This suggests that it is not just simply being an agricultural producer that qualifies one for anti-trust protection, but rather, one must be an agricultural producer of the "helpless" type Congress intended to aid. Such language certainly suggests that the Court feels economic power alone is enough to disqualify certain agricultural producers from Capper-Volstead cooperative membership.

Unfortunately, the Court did not have to directly address the question of whether a firm, sufficiently involved in agricultural production to be labeled a "producer", can be ineligible for Capper-Volstead protection because of its economic strength and market power. (i.e. Should a Tenneco or Del Monte be ineligible for antitrust protection because of its market power?)

> Because we conclude that these members [the integrators owning neither a breeder flock or hatchery, nor operating a grow-out facility] have not made the kind of investment that would entitle them to the protection of the Act, we need not consider whether, even if they had, they would be ineligible for the protection of the Act because their economic position is such that they are not helplessly exposed to the risks about which Congress was concerned."[2]

However, the Court's observation that the Act was special interest legislation for the "helpless" producer certainly seems to hint that the Court feels that Congress did not intend to benefit certain large producers. This certainly creates some uncertainty as to the ability of industrial corporations to be cooperative members. It is doubtful that processors large enough to integrate or conglomerates having farm operations can be viewed as "helpless".

As such, the Supreme Court's decision in the NBMA case represents an important turn-around in judicial thinking. Not only has "farmer" been given

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[1]Ibid., p. 10.

[2]Ibid., p. 11-12, note 20.

a more limited definition in that certain integrators do not qualify, but the ability of all large corporate producers to benefit from the Act's antitrust protection has been brought into question. This certainly represents a change from the "green-light" earlier judicial decisions had provided industrial corporations with regard to their ability to participate in Capper-Volstead cooperatives. It is interesting to note one observation Knutson made prior to the NBMA decision. "Corporate agri-business producers [can] be ruled out of cooperatives. [But for] this to happen, the Government would have to give considerable weight to the sheer question of intent of Congress in enacting the law."[1] It appears that the Supreme Court decision in NBMA is pointing in that direction.

Must Cooperative Members Associate for Handling, Processing, or Marketing Purposes?

Justice Brennan discusses another type of constraint he feels should be levied against the accessability integrated firms have to cooperatives in his separate opinion in the NBMA case. He notes that the Capper-Volstead Act only authorizes farmers to act together "in collectively processing, preparing for market, handling, and marketing" their products. Consequently, he questions whether "a fully integrated producer of agricultural products performing its own processing or manufacturing and which does not associate for purposes of common handling, processing and marketing, is nevertheless engaged in the production of agriculture as a farmer."[2]

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[1]Knutson, p. 146.

[2]NBMA, Slip Opinion, Concurring Opinion, p. 6.

Brennan notes that some integrators seek to form or join cooperatives even though they perform their own processing and marketing. He observes that such integrators usually only intend to use the cooperative as a price fixing shield, but that Congress had no intention to authorize such activity by such firms.

> It is hard to believe that in enacting a provision to authorize horizontal combinations for purposes of collective processing, handling, and marketing so as to eliminate middlemen, Congress authorized firms which integrated further downstream beyond the level at which cooperatives could be utilized for these purposes to combine horizontally as a cartel with license to carve up the national agricultural market.[1]

In light of the Act's language and the apparent intent of Congress, Brennan concludes that the Act was only intended to provide anti-trust protection to those producers who join cooperatives to process, handle, or market their produce.

> I seriously question the validity of any definition of 'farmer' in Section 1 which does not limit that term to exempt only persons engaged in agricultural production to use cooperative associations for collective handling and processing - the very activities for which the exemption was created.[2]

This opinion of Justice Brennan's is significant in that it examines the status of the fully integrated firm under the Act, something that was not done by the majority's opinion. Certainly, his conclusion could be the foreshadowing of another constraint the courts will levy against corporate activity in Capper-Volstead cooperatives in the future.

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[1]Ibid., p. 7.

[2]Ibid., p. 8.

CHAPTER VI

SUMMARY AND CONCLUSIONS

Summary

What have the courts concluded to be "[a person] engaged in the production of agricultural products as [a farmer]"?

Initially, one must be a "person". However, the courts have not interpreted this to be much of a limiting factor on the types of organizations that can take advantage of the Act. It is generally noted that the United States Code defines "persons" to include corporations, partnerships, and associations, as well as individuals, unless the context of the law indicates otherwise. The courts have found no such indication in the Capper-Volstead Act. An argument that the Act's protection be limited to "natural" persons was specifically rejected by the District Court in Maryland and Virginia Milk Producers.

Second, a beneficiary of the Capper-Volstead antitrust exemption must be an agricultural producer. What constitutes a "producer" has generally been a tougher question for the Courts. A general definition of "producer" that has been used is "anyone who grows an article or causes it to appear". Processors and manufacturers not engaged in growing activities have not been considered "producers", even though they may handle and market agricultural products. However, if a firm is involved in some growing activity, it is a "producer", even though it may devote the major portion of its resources to non-farming activities.

Finally, a firm seeking to participate in collective action under the protection of the Act must be a "farmer". The courts have only recently concluded that "farmers" constitutes a more exclusive group than "producers".

In other words, not all "producers" are "farmers". Consequently, defining "farmer" has become a key in determining the availability of the Act's anti-trust exemption. Unfortunately, the NBMA case represents the only real attempt by the courts, until now, to define "farmer", and the resulting Supreme Court decision was of limited scope. There, the Court concluded that an integrator firm, even when absorbing a large proportion of production risk, is not a "farmer" when the actual growing of the product is performed by an independent contractor.

However, even though the actual Supreme Court decision in NBMA was limited in scope, the Court's opinion seems to suggest that the requirement of being a "farmer" limits the number of producers who can benefit from the Act in another important way. Specifically, the Court determined that the Act was intended by Congress to benefit only those producers whose economic position rendered them comparatively "helpless". Such a determination seems to indicate that only small, "helpless" producers qualify as "farmers" under the Act. This suggests that the Court might not be adverse in the future to finding a producer ineligible for the Act's protection simply because it possesses sufficient market power such that it is not "helpless".

Another possible constraint on the accessibility producers should have to Capper-Volstead cooperative membership was suggested by Justice Brennan in his concurring opinion in NBMA. Brennan notes that the Act only authorizes farmer cooperatives to collectively handle, process, and market its members' products. Consequently, he suggests that producers who perform their own processing and marketing should not have access to Capper-Volstead cooperative membership.

Conclusions

What is the status of different types of agricultural producers under the Capper-Volstead Act today?

The family farm is, by far, the most common type of business entity producing agricultural products today. The legislative history of the Act indicates that this is the type of firm Congress was primarily interested in benefiting when it enacted the Act. Consequently, the family farmer's ability to engage in collective action under the protection of the Act has never really been questioned. It makes no difference whether he is a full or part-time farmer, or whether his farm is organized as a sole proprietorship, partnership, or corporation.

Small landowners who lease their land to independent operators have also, traditionally, had full access to Capper-Volstead cooperative membership. Often, these landlords rent their land on a crop-share basis and use the cooperative to handle and market their products. One could argue that NBMA threats the ability of the small landlord to benefit from the Act's protection if a landlord leasing to an independent operator is viewed as being analgous to an integrator contracting with an independent grower. However, the Supreme Court in NBMA placed heavy emphasis on the fact that the integrator firms in question were actively involved in processing, and processors were determined not to be protected by the Act. Therefore, the small landlord, who can be viewed as "helpless", probably continues to have full access to Capper-Volstead protection.

Another type of firm involved in agricultural production today is the integrator firm. Such firms are involved in more than one stage of the production-servicing-marketing complex. Integrator firms involved in

agricultural production are usually processors that have integrated backwards, but there are a few producers that have integrated forward also.

NBMA makes it clear that integrators using independent contractors to actually grow the agricultural product do not qualify as "farmers", eligible for Capper-Volstead protection, even though they may retain a large share of managerial control and absorb a large share of production risk. The status of the integrator who actually does grow or cause to appear agricultural products is less certain. Such firms, until NBMA, pretty much had free access to the Act's protection. However, the ability of integrators of all types to participate as members in Capper-Volstead cooperatives has become less certain after NBMA. It is indeed doubtful that many firms large enough to integrate can be viewed as "helpless". In addition, fully integrated firms performing their own processing and marketing may find their Capper-Volstead cooperative membership jeopardized in the future if the Act is viewed as authorizing only collective processing, handling, and marketing.

Finally, there are a number of industrial conglomerates that have become directly involved in agricultural production by owning and operating their own farms. The Supreme Court's statement in NBMA that the Act was only intended to benefit the "helpless" producer, creates the same uncertainty for the conglomerate producer as it does for the integrator producer. Although they have had free access to the Act's protection in the past, the ability of these conglomerates to participate in Capper-Volstead cooperatives in the future has certainly been clouded.

In conclusion, the question of what is a Capper-Volstead "farmer" has not been completely answered. In fact, recent judicial interpretation has raised as many questions as it has answered. As a result, the ability of several type

of agricultural producers to benefit from Capper-Volstead cooperative membership remains uncertain. One consolation to these producers, cooperatives, family farmers, and others interested in the problem, is that uncertainty breeds litigation. Therefore, it is certain that the courts will have the opportunity to further refine their interpretation of "farmer" under the Capper-Volstead Act in the near future.

BIBLIOGRAPHY

Abrahamson, Martin A. Cooperative Business Enterprise. New York: McGraw-Hill Book Company, 1976.

Baarda, James. "Supreme Court Co-op Decision: Offers Definition of Farmers." Farmer Cooperatives, August 1978.

"Bargaining at Work, Labor Problems, Commodity Marketing Experiences." Farmer Cooperatives, May 1977.

Black, William E. and Haskell, James E. "Vertical Integration Through Ownership." Marketing Alternatives for Agriculture, Cooperative Extension, New York State College of Agriculture and Life Sciences, Cornell University, Ithaca, New York, 1977.

Breimyer, Harold F. "Who are Farmers?" Economic and Marketing Information for Missouri Agriculture, Vol. 12, No. 4, Cooperative Extension Service, University of Missouri, Columbia, Missouri, April 1969.

Breimyer, Harold F. and Barr, Wallace. "Issues in Concentration Versus Dispersion." Who Will Control U. S. Agriculture?, North Central Regional Extension Publication 32, University of Illinois, Urbana, Illinois, August 1972

Breimyer, Harold F. and Torgerson, Randall E. "Farmer Cooperatives: By Whom and for Whom?" Economic and Marketing Information for Missouri Agriculture, Vol. 19, No. 4, Cooperative Extension Service, University of Missouri, Columbia, Missouri, April 1971.

Campbell, J. Phil. "Cooperatives: A Necessary Family Farm Marketing Tool." News for Farmer Cooperatives, July 1974.

Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 1966 Trade Cases, Commerce Clearing House.

Coffman, George. Corporations With Farming Operations. No. 209, Economic Research Service, U. S. Department of Agriculture, June 1971.

Coffman, George W. and Scofield, William H. Corporations Having Agricultural Operations - Preliminary Report II. No. 156, U. S. Department of Agriculture, April 1969.

Federal Trade Commission, Bureau of Competition, Staff Report on Agricultural Cooperatives. Washington, D. C., September 1975.

Hlavecek, Joe and Troll, Tim. "Antitrust: Farmers, Cooperatives, and Agribusiness; Not Everything is 'Ho' 'Ho' 'Ho' in the Valley of the Jolly Green Giants." Unpublished Research Paper, Washburn University, 1978.

Holly Farms Poultry Industries, Inc. v. Kleindienst, 1973 Trade Cases, Commerce Clearing House.

Knapp, Joseph G. Capper-Volstead Impact on Cooperative Structure. Information 97, Farmer Cooperative Service, U. S. Department of Agriculture, February 1975.

Knutson, Ronald D. "What is a Producer?" Proceedings of the National Symposium on Cooperatives and the Law, Madison, Wisconsin, April 1974.

Kravitz, Linda. Who's Minding the Co-op? Agribusiness Accountability Project Washington, D. C., March 1974.

Kyle, Leonard R., W. B. Sundquist and Harold D. Guither. "Who Controls Agriculture Now? - - The Trends Underway." Who Will Control U. S. Agriculture?, North Central Regional Extension Publication 32, University of Illinois, Urbana, Illinois, August 1972.

Maryland and Virginia Milk Prodcuers Association, Inc., v. United States, 362 U.S. 458 (1960).

National Broiler Marketing Association v. United States, S. Ct. Docket No. 77-177, Slip Opinion, June 12, 1978.

O'Byrne, John C. Farm Income Tax Manual. Indianapolis, Indiana: The Allen Smith Company, 1970.

Olsson, Philip. "Farmer Cooperatives - - New Dimensions of Conduct." Proceedings of the National Symposium on Cooperatives and the Law, Madison, Wisconsin, April 1974.

Reimond, Donn A. Farming and Agribusiness Activities of Large Multi-Unit Firms No. 591, Economic Research Service, U. S. Department of Agriculture, March 1975.

Rhodes, James V. "Policies Affecting Access to Markets." Who Will Control U. S. Agriculture?, North Central Regional Extension Publication 32, University of Illinois, Urbana, Illinois, August 1972.

Roy, Ewell. Cooperatives: Today and Tomorrow. Danville, Illinois: The Interstate Printers and Publishers, 1969.

Schneider, Vernon E. "Corporate Involvement in Cooperatives." Agricultural Cooperatives and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, St. Louis, Missouri, June 1977

Schneider, Vernon E., Clement E. Ward and Ramon Lopez. Corporation Involvement in Agricultural Cooperatives. Preliminary Research Bulletin, Texas Agricultural Experiment Station, February 1978.

Shaars, Marvin A. Cooperatives, Principles and Practices. Cooperative Extension Programs, University of Wisconsin, Madison, Wisconsin, 1970.

Shepard, William G. (ed.). Readings in Public Policies Toward Business. Homewood, Illinois: Richard D. Irwin, 1975.

Snyder, Ralph. We Kansas Farmers: Development of Farm Organizations and Cooperative Associations in Kansas. F. M. Steves and Sons, 1953.

Sporlender, Thomas C. and Holder, David C. "Vertical Coordination Through Forward Contracting." Marketing Alternatives for Agriculture, Cooperative Extension, New York State College of Agriculture and Life Sciences, Cornell University, Ithaca, New York, 1977.

"Supreme Court Rules Against Broiler Integrators." Turkey World, July - August 1978.

Thor, Eric. "Status of Nontraditional Cooperatives." Agricultural Cooperative and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, St. Louis, Missouri, June 1977.

Torgerson, Randall E. Basics of Farmer Cooperatives. Manual 81, Extension Division, University of Missouri, Columbia, Missouri, February 1972.

Torgerson, Randall E. "An Overall Assessment of Cooperative Market Power." Agricultural Cooperatives and the Public Interest, Proceedings of a North Central Regional Committee 117 Sponsored Workshop, St. Louis, Missouri, June 1977.

"Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives." 61 Virginia Law Review 341 (1975).

United States v. Elm Spring Farm, Inc., 38 F. Supp. 508 (D. Mass. 1941).

United States v. Maryland and Virginia Milk Producers Association, Inc., 167 F. Supp. 45 (D.D.C. 1958).

United States v. National Broiler Marketing Association, 1975 Trade Cases, Commerce Clearing House.

United States v. National Broiler Marketing Association, 1977 Trade Cases, Commerce Clearing House.

U. S. Congress. House. Committee on the Judiciary. Family Farm Act, Hearings before a subcommittee of the House Committee on the Judiciary on H. R. 11654. 92d Cong., 2d. sess., 1972.

U. S. Congress. House. Committee on the Judiciary. Food Price Investigation, Hearings before a subcommittee on the Judiciary. 93d Cong., 1st. sess., 1973.

U. S. Department of Agriculture. Antitrust Laws. Information 100, Farmer Cooperative Service, May 1976.

U. S. Department of Commerce. 1974 Census of Agriculture, Volume II, Statistics by Subject, Part 3: Tenure, Type of Organization, Contracts, Operato Characteristics, Principal Occupation, September 1978.

U. S. Department of Justice. Milk Marketing. A Report to the Task Group of Antitrust Immunities, January 1977.

Volkin, David. "Keys to Understanding Capper-Volstead." News for Farmer Cooperatives, July 1974.

AN ANALYSIS OF THE AVAILABILITY OF CAPPER-VOLSTEAD COOPERATIVE MEMBERSHIP TO AGRICULTURAL PRODUCERS

by

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The Capper-Volstead Act authorizes "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" to collectively process and market their products through cooperatives. This ability of farmers to collectively market their products includes the ability to collectively set a common-price, an activity that without the Act's authorization, could be a violation of the antitrust laws. Consequently, agricultural producers of all types are anxious to label themselves "farmers", eligible to form or join cooperatives benefiting from the Act's antitrust provision. The purpose of this report was to determine what types of agricultural producers are eligible for Capper-Volstead cooperative membership.

The Capper-Volstead Act was enacted in 1922, a time when many farmers were facing economic hardship. The legislative history of the Act indicates that Congress intended through the Act to increase the market power of the family farmer, who as an individual, was largely at the mercy of the larger business firms with whom he dealt. However, through the years, the structure of agriculture changed to where agricultural products were no longer being exclusively produced on the family farm. Today, large integrated processors and corporate conglomerates are involved in agricultural production. This has clouded the distinction between "farmers" and other business entities and has raised the question of what type of producer is Capper-Volstead intended to benefit.

The ultimate determination as to what type of business firm is eligible for Capper-Volstead cooperative membership lies with the courts. Through the first fifty years of the Act's existence, the courts gave a fairly liberal interpretation to "[p]ersons engaged in the production of agricultural products

as farmers". Any type of business firm producing agricultural products was generally determined to be eligible for Capper-Volstead protection.

However, in a 1978 case involving integrated broiler producers, the United States Supreme Court gave a more limited interpretation as to who can benefit from Capper-Volstead's antitrust exemption. The Supreme Court concluded that in order to qualify for Capper-Volstead cooperative membership, a firm must not only be an agricultural producer but also a "farmer". The Supreme Court's opinion further suggests that only those agricultural producers whose economic position render them comparatively "helpless" are "farmers". Such a determination has created some uncertainty as to the future ability of certain types of agricultural producers, particularly integrators and conglomerates, to participate as members of Capper-Volstead cooperatives.