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The Antitrust Impact of Vertical Integration in Agricultural Cooperatives

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THE ANTITRUST IMPACT OF VERTICAL INTEGRATION IN AGRICULTURAL COOPERATIVES

Fundamentally, a cooperative is an association entered into by several persons or individual businesses for the purpose of purchasing or marketing goods or services at the lowest possible cost.¹ The cooperative movement in agriculture is predicated on the notion that the individual farmer-businessman is unable to compete effectively in a corporate economy. Consequently, farmers have organized into cooperative associations which bargain collectively for their members, as a means of strengthening the farmers' position in the market place, both as sellers and as buyers. In addition, the joint activity of the cooperative members enables them to achieve the economies of scale available only to large integrated businesses.

Presently, there is a tendency for cooperatives to use their collective power in an ever-widening sphere of activity, by attempting to represent the individual farmer in virtually all aspects of his farm business. Through the process of vertical integration, a cooperative can encompass all facets of agricultural activity from aiding the farmer as a buyer of items necessary for production to representing him as a seller of his finished products.

This trend toward increasing vertical integration in agriculture obviously has an impact on market conditions. Although cooperatives have been accorded some special treatment under the federal antitrust laws, these laws still limit the extent to which vertical integration can legally reduce competition. The purpose of this Note is to analyze the legality under the federal antitrust laws of vertical integration by agricultural cooperatives.

I. VERTICAL INTEGRATION

Vertical integration is the process of acquiring and coordinating successive stages of production and/or distribution facilities and activities.² In order to achieve true vertical integration, the stages coordinated must be so distinct that each of them could be conducted as a separate business, rather than merely as one aspect of a total undertaking.³ A business operation may integrate either forward or backward. Forward integration involves the acquisition of facilities which can be used to refine or distribute the cooperative's products toward the ultimate market as, for example, where a producers' cooperative acquires a processing plant. Backward integration relates to the acquisition of facilities or businesses that normally precede the processing activity of the acquiring cooperative. The acquisition of a seed or fertilizer plant by a grain producers' cooperative is an example of backward vertical integration.

¹ By collective buying and selling, cooperative members are able to strengthen their bargaining positions and receive the special prices and other considerations given for large volume transactions. See KNAPP, *FARMERS IN BUSINESS* 8 (1963); HULBERT, *LEGAL PHASES OF FARM COOPERATIVES* 7-8 (Farm Cooperative Service Bull. No. 10, 1958) [hereinafter cited as HULBERT].

² Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 *YALE L.J.* 1, 6-7 (1959).

³ Adelman, *Integration and Antitrust Policy*, 63 *HARV. L. REV.* 27, 29-31 (1949).

Vertical integration is commercially desirable as a cost reduction device and as a method of increasing business stability.⁴ Vertical integration reduces cost by eliminating the profit margins and marketing expenses ordinarily existing between the various stages of production or distribution. In addition, it aids in the stabilization of the business because control over several phases of the production or distribution of products facilitates long-range planning.⁵

Vertical integration can, however, have serious anticompetitive effects. For example, if a producers' cooperative acquires the major independent processing plant in an area, competing producers may then be forced to join the cooperative or go out of business.⁶ Since vertical integration may be used to eliminate competition, it has been argued to be illegal per se.⁷ However, it may often be nothing more than evidence of healthy business growth.⁸

A. Integration by Ownership

By purchasing other enterprises, a business operation may be integrated into its particular line of commerce through direct ownership, either forward or backward. The chief advantage of integration through ownership is the degree of control it allows.⁹ Where successive stages of a producing or marketing operation are owned outright, control can be complete since no outside interests are present to offer opposition to cooperative policies. If, however, a high degree of control is the advantage of ownership integration, lack of flexibility is its weakness.¹⁰ This is particularly true in businesses in which there are rapid changes in methods and styles which make binding commitments through ownership undesirable.¹¹ However, due to the steady consumer demand generally associated with staple agricultural commodities, this lack of flexibility is not as significant to agricultural cooperatives as it is to most other businesses.

B. Integration by Contract

Vertical integration may also be achieved by the use of contractual

⁴ Kessler & Stern, *supra* note 2, at 2-4.

⁵ *Ibid.*

⁶ Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 468-69 (1960) (acquisition found to substantially lessen competition).

⁷ United States v. Columbia Steel Co., 332 U.S. 495, 519, 523-26 (1948); United States v. Yellow Cab Co., 332 U.S. 218, 224-25 (1947).

⁸ See Singer, *Vertical Integration and Economic Growth*, 50 A.B.A.J. 555 (1964). The author urges that a distinction should be drawn, for antitrust purposes, between vertical integration which is merely designed to lessen competition and vertical integration which is the consequence of necessary business expansion. See also Adelman, *supra* note 3, at 4.

⁹ See Kessler & Stern, *supra* note 2, at 4-5.

¹⁰ See *id.* at 5-8.

¹¹ Such commitments are undesirable in a highly changeable business since the operation must be ready to change as rapidly as the market. In such a situation, flexibility rather than stability should be an integrated business's prime concern. See *id.* at 6.

arrangements.¹² Interlocking contracts can be used to establish the integration of successive stages of the business operation. Unlike ownership integration, integration by contract allows a broad range of flexibility.¹³ Because the parties can vary the nature of their commitments through alternative contractual provisions or modification of their original contract, flexibility can be built into the integrating agreement.¹⁴ Express provisions may be included allowing an ease of withdrawal from the contract or giving the contract a short life with periodic renewals. However, although the basic contract remedies are available to insure a certain degree of control, the lack of assured renewals in this situation is a constant threat to long-range planning.¹⁵

Since both contractual arrangements and ownership situations have advantages and disadvantages, some businesses have found it expedient to integrate through a combination of contract and direct ownership arrangements.¹⁶ Yet, because consumer demand for agricultural commodities is relatively stable, cooperatives are generally more concerned with control than flexibility and are thus more likely to become vertically integrated by ownership.

II. COOPERATIVES AND ANTITRUST LAW

A. *The Sherman Act*

Since the passage in 1890 of the Sherman Act,¹⁷ the basic federal antitrust statute, it has been argued that agricultural groups should be granted special treatment under federal antitrust laws. The Sherman Act declared illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ."¹⁸ The statute also prohibited monopolizing and attempting to monopolize any trade affecting interstate commerce.¹⁹ According to Senator Sherman, the trusts and combinations covered by the statute had the effect of reducing the prices of agricultural products while increasing the price of other goods.²⁰ Senator Sherman

¹² Contractual integration has been viewed as an alternative to ownership integration. See *Standard Oil Co. v. United States*, 337 U.S. 293, 319 (1949) (separate opinion).

¹³ Kessler & Stern, *supra* note 2, at 6.

¹⁴ The process of bargaining for commitments is an ideal means of arriving at the proper balance of flexibility and stability required by the particular situation. *Id.* at 6-7.

¹⁵ It has been pointed out that in some cases the threat of nonrenewal is itself a means of control. *Id.* at 4.

¹⁶ See *Atlantic Ref. Co. v. Hodgman*, 13 F.2d 781 (3d Cir. 1926); *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936).

¹⁷ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964). For a discussion of the purposes and propriety of federal antitrust law, see congressional debates on the Sherman Act, 21 CONG. REC. 2461, 2598 (1890) (remarks of Senator Sherman).

¹⁸ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

¹⁹ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1964).

²⁰ "They operate with a double-edged sword. They increase beyond reason the cost of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country." 21 CONG. REC. 2461 (1890) (remarks of Senator Sherman).

introduced an amendment to the original bill that would have granted express immunity to combinations of farmers endeavoring to increase the market price of their agricultural products.²¹ Others expressed the view that the act should be designed to give relief specifically to farmers who were in great economic distress as a result of the activities of the trusts and combinations.²² This view was opposed, however, by those who argued that special agricultural consideration was no more than regional favoritism and that the western corn producer should not receive different treatment from that accorded New England fishermen or manufacturers.²³ Although the Sherman amendment was initially adopted by the Senate, it was later deleted when the bill was referred back to the Senate Judiciary Committee.²⁴

Following the enactment of the Sherman Act, cooperatives began to fear that this statute would be used against them. Since the farmers were generally independent businessmen, the formation of a cooperative necessarily involved a lessening of competition. The Supreme Court²⁵ and numerous state courts²⁶ handed down decisions increasing these fears which forced cooperatives to place more pressure on Congress for an express antitrust exemption. Congressional response to this pressure was embodied in section 6 of the Clayton Act of 1914.²⁷

B. *The Clayton Act*

Section 6 of the Clayton Act offered cooperatives their first partial exemption from the antitrust laws. It provided:

Nothing contained in the antitrust laws shall be construed to forbid the

²¹ *Id.* at 2612. The same amendment would have exempted labor organizations.

²² "[T]he people in many parts of our country, especially the agricultural people, are in greater distress than they have ever been before. They look with longing eyes, they turn their faces to us with pleading hands asking us to do something to relieve them from their trouble." *Id.* at 2598 (remarks of Senator George).

²³ *Id.* at 2611 (remarks of Senator Blair).

²⁴ Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 *NEB. L. REV.* 73, 75 n.7 (1963); Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 *VA. L. REV.* 63-64 (1958).

²⁵ *Loewe v. Lawlor*, 208 U.S. 274 (1908) (dictum). The Court recognized that attempts had been made in Congress to exclude cooperatives from the operation of the Sherman Act. However, since these attempts failed, the Court indicated that it would find no congressional intent to extend special treatment to agricultural cooperatives. *Id.* at 277. One modern writer has said that, in light of the legislative history, the omission by Congress is probably most plausibly interpreted as indicating that Congress felt a specific exemption was unnecessary since these organizations were really exempt from the antitrust laws by "the nature of things." THORELLI, *THE FEDERAL ANTITRUST POLICY* 231-32 (1955). Although an alternative interpretation might be that Congress meant to leave this matter to the courts, this seems unlikely in view of the legislative history and the lack of opposition to the Sherman amendment.

²⁶ *E.g.*, *Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913); *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166, 39 N.E. 651 (1895); *Reeves v. Decorah Farmer's Co-op. Soc'y*, 160 Iowa 194, 140 N.W. 844 (1913).

²⁷ 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain the individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.²⁸

The scope of this exemption has, however, been consistently disputed. Congressional debate indicated early awareness that the language used in section 6 was unclear.²⁹ Several amendments designed to clarify the extent of the exemption were proposed,³⁰ but none were enacted.³¹ The vague language probably accounts for the initial diversity of opinion³² concerning the scope of the exemption.

The Justice Department has consistently taken the position that farmers may look to section 6 only for authorization to enter the market as an association rather than as competing individual businessmen.³³ The Department contends that in all other respects a cooperative should meet the same standards of conduct expected of other businesses. On the other hand, agricultural interests argue that section 6 was meant to give total immunity from the application of antitrust law.³⁴ This interpretation is supported by the fact that until 1929 Congress consistently refused to grant appropriations for the prosecution of cooperatives under the antitrust laws.³⁵

The limits of the immunity granted in section 6 were authoritatively defined by the Supreme Court in *Maryland & Va. Milk Producers Ass'n v. United States*:³⁶

[T]he full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carry-

²⁸ *Ibid.*

²⁹ "It looks as though it has been drawn to deceive somebody. . . . It is unfortunate, and it seems to me that before we close the discussion on this paragraph some proposition ought to be submitted that no one can dispute. We ought to know what we are voting for." 51 CONG. REC. 9564 (1914) (remarks of Representative Volstead).

³⁰ See *id.* at 9538, 9566-69, 14546-47; Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 76 n.12 (1963).

³¹ For a good discussion of congressional debates on § 6 of the Clayton Act, see Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 37-40 (1960).

³² *E.g.*, *April v. National Cranberry Ass'n*, 168 F. Supp. 919 (D. Mass. 1958); *United States v. Dairy Co-op. Ass'n*, 49 F. Supp. 475 (D. Ore. 1943); *United States v. King*, 250 Fed. 908 (D. Mass. 1916).

³³ Address by Assistant Attorney General Stanley N. Barnes, American Institute of Cooperation, Aug. 10, 1953.

³⁴ This argument has been repeated in antitrust prosecutions of cooperatives since the adoption of § 6 of the Clayton Act. *E.g.*, *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1, 9 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962).

³⁵ Riders on appropriation bills provided that funds were not to be used to prosecute cooperatives having the purposes of obtaining and maintaining fair and reasonable prices for farm products. See HULBERT 250-51.

³⁶ 362 U.S. 458 (1960).

ing out *the legitimate objects thereof* . . . but the section cannot support the contention that it gives such an entity full freedom to engage in predatory practices at will.³⁷

This appears to be an adoption of the Justice Department's position that although section 6 of the Clayton Act exempts the *organization* of cooperatives from the antitrust laws, the *conduct* of cooperatives is still subject to such laws to the same extent as that of any other business. In light of the statute's purpose of allowing the individual farmer means by which he may effectively compete in the market, this interpretation seems logical. Once he is given these means he should be held to the same standards of conduct as are all other businesses in his market. A contrary holding would give the cooperative an undue advantage over noncooperative operations.

C. The Capper-Volstead Act

Two years after the enactment of the Clayton Act, a federal district court indicated, in an opinion which foreshadowed the *Maryland & Virginia*³⁸ decision, that section 6 organizations were "not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations."³⁹ This language, coupled with the provision in section 6 of the Clayton Act limiting special treatment to associations not conducted for profit,⁴⁰ caused a great unrest among agricultural interests. Dissatisfaction was based on the fear that cooperatives would be seen as profit-oriented if they actively engaged in collective bargaining in the market place in order to increase profits for members.⁴¹ Since granting farmers the freedom to associate would be worthless if their associations could not actively bargain in the market place, pressures mounted for additional legislation to define more clearly the activities which could legally be conducted by cooperatives⁴² and to ensure that their collective bargaining methods were not illegal in and of themselves.⁴³

The Capper-Volstead Act⁴⁴ was designed to make it clear that co-

³⁷ *Id.* at 465-66.

³⁸ 362 U.S. 458 (1960).

³⁹ *United States v. King*, 250 Fed. 908, 910 (D. Mass. 1916) (dictum).

⁴⁰ The statute applies only to "agricultural, or horticultural organizations, instituted for the purposes of mutual help, and *not* having capital stock or *conducted for profit* . . ." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964) (Emphasis added.)

⁴¹ It was feared that the cooperatives' concern for the profits of members would cause the courts to view them as outside the protection given by § 6 of the Clayton Act. See Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 76-77 (1963); Note, *Agricultural Cooperatives and Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 64 (1958).

⁴² Parallel bills were introduced by Representative Volstead and Senator Capper in 1920. 59 CONG. REC. 6553 (1920). Although these bills were not enacted, the Capper-Volstead Act, with substantially the same provisions, met with congressional approval two years later.

⁴³ For a more complete outline of legislative activity leading up to the Capper-Volstead Act, see Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 77-81 (1963).

⁴⁴ 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1964).

operatives could bargain collectively.⁴⁵ The act provided that persons engaged in agricultural production could act together in associations to process, prepare for market, handle, and actually market their own products.⁴⁶ Common marketing agencies were authorized and the cooperatives were empowered to make all necessary contracts and agreements needed to carry out the purposes of the associations without antitrust liability.⁴⁷ The Capper-Volstead Act specified certain organizational requirements that the cooperative must meet in order to qualify for antitrust immunity.⁴⁸ In addition, the act declared that cooperatives cannot monopolize or restrain trade to the point where the price of any product is unduly enhanced.⁴⁹

The Supreme Court has also placed limits on the scope of the antitrust immunity conferred by the Capper-Volstead Act. In *United States v. Borden Co.*⁵⁰ it was held that this act did not exempt cooperatives from prosecutions for restraint of trade under section 1 of the Sherman Act, where the cooperative had combined or conspired with nonagricultural interests. In the *Maryland & Virginia* case, the Court stated that section 6 of the Clayton Act and the Capper-Volstead Act are both premised on the concept "that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations."⁵¹ The Court stated that it adhered to the reasoning in the *Borden* case, and that just as the predatory practices of a cooperative might be found to have violated section 1 of the Sherman Act, there is no cooperative immunity in regard to sections 2 or 3 of that act.⁵² Consequently, it appears as if the antitrust immunity accorded agricultural cooperatives by Congress merely authorizes them to organize and, once organized, to function as all other businesses must—within the framework of the antitrust laws.

⁴⁵ See 61 CONG. REC. 1033 (1921) (remarks of Representative Volstead); 62 *id.* at 2057-58 (1922) (remarks of Senator Capper).

⁴⁶ 42 Stat. 388 (1922), 7 U.S.C. § 291 (1964).

⁴⁷ *Ibid.*

⁴⁸ The association must operate for the mutual benefit of its members, as producers, and must meet 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.

An additional requirement is imposed on all such associations that they may not deal in the products of nonmembers with a greater total value than the products handled for members. *Ibid.*

⁴⁹ 42 Stat. 388 (1922), 7 U.S.C. § 292 (1964). Under this provision, the Secretary of Agriculture is empowered to bring specified enforcement actions. The Secretary has never brought such an action. The Court has held that this power in the Secretary does not bar prosecution by other enforcement agencies under the Sherman Act. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 462-63 (1960); *United States v. Borden Co.*, 308 U.S. 188, 206 (1939).

⁵⁰ 308 U.S. 188 (1939).

⁵¹ 362 U.S. 458, 466 (1960).

⁵² *Id.* at 463-64.

III. VERTICAL INTEGRATION BY OWNERSHIP UNDER SECTION 7 OF THE CLAYTON ACT

Vertical integration is presently regulated by five sections of three federal antitrust statutes:⁵³ sections 1 and 2 of the Sherman Act,⁵⁴ sections 3 and 7 of the Clayton Act,⁵⁵ and section 5 of the Federal Trade Commission Act.⁵⁶ These provisions are general regulatory and prohibitive statutes of broad application. The special treatment accorded cooperatives is derived almost entirely from section 6 of the Clayton Act and the Capper-Volstead Act.⁵⁷ The language of these two provisions indicates that they are applicable to all the federal antitrust laws.⁵⁸ Since this Note focuses on the legality of vertical integration by agricultural cooperatives and since the statutes providing special treatment apply to all relevant antitrust laws, repetition will be reduced and a more exhaustive analysis may be conducted by limiting examination to just one of the five provisions set out above as regulating or prohibiting vertical integration. An examination of the treatment given cooperatives under one of these sections should serve as a basis of prediction for the entire field.

The statute selected for analysis is section 7 of the Clayton Act.⁵⁹

⁵³ Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 *YALE L.J.* 1, 21 (1959).

⁵⁴ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1964).

⁵⁵ 38 Stat. 731 (1914), as amended, 15 U.S.C. §§ 14, 18 (1964).

⁵⁶ 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

⁵⁷ Congress has passed several other statutes that relate to cooperatives and antitrust law. The Cooperative Marketing Act, 44 Stat. 797 (1926), 7 U.S.C. § 455 (1964), allows

persons engaged, as original producers of agricultural products, . . . acting together in associations . . . [handling] such products of persons so engaged . . . [to exchange information] by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

The Agricultural Marketing Agreement Act of 1937, 48 Stat. 34, as amended, 7 U.S.C. § 608(b) (1964), authorizes the Secretary of Agriculture to enter into marketing agreements with those engaged in the distribution of agricultural commodities or products. As amended, the act provides that "the making of any such agreement shall not be held to be in violation of any of the antitrust laws. . . ." The Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a)-(f) (1964), declaring price discrimination to be illegal, makes special allowances to permit cooperatives to return net profits to member-patrons. Section 7 of the Clayton Act may also be considered in this category, but extensive treatment of it is given beginning in text accompanying note 53 *supra*.

⁵⁸ Section 6 of the Clayton Act uses the language, "nothing contained in the antitrust laws . . ." and "under the antitrust laws." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964). The Capper-Volstead Act sets out what the cooperatives "may" do. There is no indication that this permissive grant is meant to apply to any specific antitrust law or laws to the exclusion of the others. 42 Stat. 388 (1922), 7 U.S.C. § 291 (1964).

⁵⁹ In its relevant provisions § 7 provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire

This choice was made for two reasons. First, it deals specifically with acquisitions that "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly."⁶⁰ Vertical integration through ownership appears to fit squarely within the language of section 7. Second, the rigorous standards for legality under section 7 make it unlikely that an arrangement will be found to violate other provisions of the federal antitrust laws if no section 7 violation is found.⁶¹

A. Purpose of Section 7

The Clayton Act was adopted in an attempt to regulate corporate combinations before they reach the proportions of an actual restraint of trade violative of the Sherman Act.⁶² Section 7 of the Clayton Act declares illegal the acquisition of an interest in a corporation or the acquisition of assets from a corporation by another corporation where the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly.⁶³ As originally enacted, section 7 applied only where competition was likely to be reduced between the acquiring and the acquired corporations and dealt only with stock acquisitions.⁶⁴ In 1950 an amendment was adopted which broadened the protection of competition to any line of commerce and removed the "acquiring-acquired" language of the original act.⁶⁵ The statute was extended to cover asset as well as stock acquisitions.⁶⁶ The amendment was adopted in the midst of congressional fear of increasing economic concentration.⁶⁷ Its purpose, like that of the original Clayton Act, was to regulate anticompetitive combinations while they were still in their incipency.⁶⁸

the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary. . . . 38 Stat. 732 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

⁶⁰ *Ibid.*

⁶¹ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.33, 328-29 (1962).

⁶² For an extensive discussion of congressional intent in this respect, see *id.* at 317-18 & n.32; BOCK, *MERGERS AND MARKETS* 12-13 (National Industrial Conference Bd., *Studies in Business Economics*, No. 85, 3d ed. 1964); Comment, *Antitrust: Clayton Act Section 7: Examination of a Merger's Competitive Effects Under Amended Section Seven*, 10 U.C.L.A.L. REV. 637 (1963).

⁶³ See note 59 *supra*.

⁶⁴ 38 Stat. 731, 732 (1914).

⁶⁵ 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). For a discussion of legislative history of the amendment, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962); S. REP. No. 1775, 81st Cong., 2d Sess. 1-5 (1950).

⁶⁶ This was intended to put an end to easy circumvention of the purpose of § 7 that had previously been available. See *Brown Shoe Co. v. United States*, *supra* note 65, at 294, 316; S. REP. No. 1775, 81st Cong., 2d Sess. 3-5 (1950).

⁶⁷ *Brown Shoe Co. v. United States*, *supra* note 65, at 315.

⁶⁸ *Id.* at 317-18 & n.32.

B. Judicial Interpretation

Brown Shoe Co. v. United States was the first case to reach the Supreme Court in which the amended section 7 received direct analysis.⁶⁹ Chief Justice Warren, writing the majority opinion, recognized that before the Court could inquire into the likely anticompetitive effects of a corporate acquisition, the relevant market in which competitive effects were to be measured had to be defined.⁷⁰ The Court quoted its statement in *United States v. E. I. du Pont de Nemours & Co.*,⁷¹ that "determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."⁷²

1. Determination of the Relevant Market

In determining the area of competition that may be adversely affected by a merger or acquisition, both a relevant product market and a relevant geographic market must be defined.⁷³ Product market is just another way of phrasing the "line of commerce" language of section 7.⁷⁴ A product market is a class of available commodities intended to fulfill a similar need, so that distribution is likely to be competitive. As the Court noted in *Brown Shoe*:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.⁷⁵

In the instances where the courts find that the anticompetitive effects of an acquisition may cover a broad market of interchangeable products, the total market affected will be studied to determine whether there has been a substantial lessening of competition or a tendency to monopolize. Where the acquisition affects only a limited submarket the courts' concern will be narrowed to the specific competitive market involved.⁷⁶ Probably the best known example of an acquisition that was held to affect such a limited submarket is the du Pont acquisition of General Motors stock that was held to have anticompetitive effects

⁶⁹ Two cases had arisen earlier, but neither of them prompted the Court to discuss § 7 in an analytical manner. See *Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961), *affirming per curiam* 187 F. Supp. 545 (E.D. Pa. 1960); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

⁷⁰ 370 U.S. at 324.

⁷¹ 353 U.S. 586 (1957).

⁷² *Id.* at 593; 370 U.S. at 324.

⁷³ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). For an excellent economic analysis of this process in light of current case law, see Bock, *op. cit. supra* note 62, at 85-153.

⁷⁴ See *Brown Shoe Co. v. United States*, *supra* note 73, at 324.

⁷⁵ *Id.* at 325.

⁷⁶ See *A. G. Spalding & Bros. v. FTC*, 301 F.2d 585 (3d Cir. 1962); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

in regard to automobile fabrics and paints, rather than fabrics and paints in general.⁷⁷

It is also necessary to ascertain the relevant geographic market affected before the competitive effects of an acquisition can be fully gauged.⁷⁸ In this context, geographic market means the geographic range of distribution of the goods found to constitute the relevant product market. Case law demonstrates that various factors have influenced the courts' delineation of this geographic market. Such things as transportation costs,⁷⁹ qualities or particular characteristics of the products,⁸⁰ and the areas in which competitors actively market their products⁸¹ have all been utilized in isolating the relevant geographic area. Correct delineation of the product and geographic markets is extremely important under section 7. In fact, it is usually determinative of the legality of the corporate acquisition under scrutiny. *United States v. E. I. du Pont de Nemours & Co.*⁸² is a case in point. It is unlikely that du Pont would have been found to have created the probability of a substantial lessening of competition, had not the Court found the relevant product market to have been automobile finishes and fabrics rather than finishes and fabrics in general.

2. Standard of Illegality

After the relevant market has been delineated,⁸³ the court must determine whether the acquisition in question may have such an adverse effect on competition as to cause a section 7 violation. The statutory standard is that a merger or acquisition is unlawful where its "effect . . . may be substantially to lessen competition, or tend to create a monopoly."⁸⁴ After a lengthy discussion of legislative history, Chief Justice Warren in the *Brown Shoe* case concluded that Congress had not indicated whether the courts were to use a qualitative or a quantitative test to determine at what point the adverse effect of an acquisition substantially lessened competition.⁸⁵

The quantitative test, which is concerned with the amount of competition affected by acquisitions either in absolute dollars or as a percentage of the relevant market, was rejected in *Brown Shoe*. The Court said that although the percentage of the market foreclosed was an important consideration, it would seldom be determinative in section 7 cases, because if the percentage were great enough to be seen as substantial per se, a violation of the Sherman Act instead of the Clayton Act would be found.⁸⁶ Instead of a quantitative test, the *Brown Shoe* Court utilized a qualitative substantiality standard under which the

⁷⁷ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

⁷⁸ See note 73 *supra*.

⁷⁹ *Erie Sand & Gravel Co. v. FTC*, 291 F.2d 279 (3d Cir. 1961).

⁸⁰ *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

⁸¹ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

⁸² 353 U.S. 586 (1957).

⁸³ The plaintiff has the burden of defining the relevant market. See *Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 233 (D. Colo. 1963).

⁸⁴ 38 Stat. 732 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

⁸⁵ 370 U.S. at 321-23.

⁸⁶ *Id.* at 329.

type of injury to competition was decisive.⁸⁷ The Court pointed out that since the statute prohibited acquisitions that *may* substantially lessen competition, the courts will be concerned with the probable effects of the acquisition rather than those effects that are possible or assured. This concern with probability has been said to limit the scope of judicial inquiry to "sufficient data to support a conclusion . . . because sufficient data to give the enforcement agencies, the courts and business certainty as to competitive consequences would nullify the words 'Where the effect may be' in the Clayton Act and convert them into 'Where the effect is.'"⁸⁸

The Court said that the most important factors to be considered under the qualitative standard were the nature and purpose of the arrangement in question.⁸⁹ These factors were said to preserve the opportunities for acquisitions and mergers that evidenced healthy competition. Further, an inquiry into the purposes of the parties was said to help in the prediction of future conduct and the probable effects of the arrangement.⁹⁰ Another factor was said to be the trend toward economic concentration in the industry.⁹¹ If, as in *Brown Shoe*, the relevant market is experiencing a trend toward progressive concentration of competitive strength in fewer and fewer hands, a court is more likely to find a substantial lessening of competition, even though the questioned acquisition directly affects a nominal percentage of the market as a whole. The *Brown Shoe* case demonstrates a tendency of the Court to consolidate the "tending to create a monopoly" language of section 7 into a broad theory of illegality that encompasses all situations where the acquisition has probable, indirect anticompetitive effects. This is evidenced by the Court's concern over anticompetitive trends in the market that in themselves tend to place monopoly power in the control of consolidated interests. As applied in *Brown Shoe*, the section 7 standard of illegality seems to have the practical effect of condemning tendencies toward the creation of oligopolies rather than monopolies in the technical sense of the word.⁹² This is but another reflection of the Court's recognition of congressional concern with economic concentration and growing 'bigness' in American business. The underlying theory of this approach is that an oligopolistic

⁸⁷ *Id.* at 332-33. For a criticism of the qualitative standard, see Comment, *The Brown Shoe Company Case: A New "Substantiality" in Section 7 of the Clayton Act*, 27 ALBANY L. REV. 54 (1963). For a criticism of the holding of the district court in *Brown Shoe*, see Bork, *Anticompetitive Enforcement Doctrines Under Section 7 of the Clayton Act*, 39 TEXAS L. REV. 832, 835-36 (1961).

⁸⁸ ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 126 (1955). The Committee of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases likewise gave emphasis to the need for limiting the volume of relevant evidence in these cases. See 13 F.R.D. 41, 64 (1951).

⁸⁹ 370 U.S. at 329.

⁹⁰ *Id.* at 329-31 & n.48.

⁹¹ *Id.* at 332.

⁹² A monopoly is generally understood to signify a single dominant power over the market. An oligopoly exists where power over the market is controlled by a very few powerful figures. See KAYSER & TURNER, ANTITRUST POLICY 27 (1959); 1 WHITNEY, ANTITRUST POLICES 14 (1958).

market is as pernicious as a monopolistic one.⁹³

The *Brown Shoe* standard of illegality, which necessitates an extensive economic analysis, was questioned in the case of *United States v. Philadelphia Nat'l Bank*,⁹⁴ decided a year after *Brown Shoe*. Mr. Justice Brennan, speaking for the majority, recognized that in addition to an appraisal of the immediate anticompetitive effects of a merger, the Court had to engage in a prediction of future effects on competition.⁹⁵ This was necessary because the Clayton Act was designed to strike down anticompetitive propensities in their incipency.⁹⁶ It was conceded that the broad economic analysis called for in *Brown Shoe* would undoubtedly be the best method of ascertaining probable competitive effects. However, the Court pointed out three reasons why a simplification of the process was necessary. First, the Court said that the economic data essential for a *Brown Shoe*-type test was complex and elusive, perhaps too elusive for an accurate judicial prediction of anticompetitive effects.⁹⁷ Second, the Court was afraid that businessmen could not make such analytical predictions about the probable effects of a pending acquisition or merger, and, as a consequence, the test would be of limited utility in business planning.⁹⁸ Finally, it was said that requiring broad economic investigations might endanger the congressional policy underlying the Clayton Act.⁹⁹ Lengthy economic investigations might become so burdensome and time consuming as to make practical application of the statute impossible. Therefore, the Court concluded that "in the interest of sound and practical judicial administration"¹⁰⁰ a simplified test of illegality should be used whenever possible.

The simplified standard which the Court proposed was that:

a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.¹⁰¹

However, the *Philadelphia Bank* case did not go so far as to hold that

⁹³ See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). Some economists regard oligopoly as the most dangerous form of monopoly power today. See KAYSEN & TURNER, *op. cit. supra* note 92, at 110-11; Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745, 793 (1949). But see DIRLAM & KAHN, *UNFAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 33 (1954).

⁹⁴ 374 U.S. 321 (1963).

⁹⁵ *Id.* at 362.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, citing Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960) (calling for a simplified legal standard).

⁹⁸ 374 U.S. at 362, citing *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 826-27 (9th Cir. 1961).

⁹⁹ 374 U.S. at 362. A case under § 3 of the Clayton Act was cited in support of this proposition. *Standard Oil Co. v. United States*, 337 U.S. 293, 313 (1949).

¹⁰⁰ 374 U.S. at 362.

¹⁰¹ *Ibid.* In the *Philadelphia Bank* case, a 30% foreclosure was held to be substantial per se.

the *Brown Shoe* test should be abandoned in every case. The courts were relieved of the heavy burden of economic analysis only when the size of the market share raises inherent suspicions in light of the policy against continued economic concentration. Following the language of the *Philadelphia Bank* case, the test might presently be stated as follows: A determination of illegality under section 7 of the Clayton Act requires a broad economic inquiry into the relevant market concerning its structure and competitive trends. However, in instances where the percentage share of the market foreclosed or to be foreclosed is so large that it raises little doubt as to its substantiality, a per se violation will be found in the absence of clear evidence that the arrangement will not have the indicated anticompetitive effects.

C. Cooperatives and Section 7

Perhaps the best point at which to begin a discussion of cooperatives and section 7 would be to eliminate initially those situations to which section 7 does not apply. The statute expressly states that it has no application where the stock is purchased for investment purposes and the stock is not voted or in any other way used to bring about a substantial lessening of competition.¹⁰² Furthermore, it has been held that section 7 has no application where stock or assets are acquired from a failing corporation on the brink of bankruptcy, because holdings in a failing corporation cannot substantially lessen competition.¹⁰³ In addition, the language of the statute covers only corporate acquisitions of other corporate stocks or assets.¹⁰⁴ Nearly all cooperatives are incorporated under state statutes providing for this particular type of corporation.¹⁰⁵ As in *Maryland & Virginia*, the courts have taken it for granted that incorporated cooperatives are "corporations" for the purposes of section 7. While there has apparently been no attempt made to apply section 7 to an unincorporated cooperative,¹⁰⁶ if state statutes permit such associations to claim limited liability or other normal corporate

¹⁰² "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." 38 Stat. 732 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964); see *Swift & Co. v. FTC*, 8 F.2d 595, 599 (7th Cir. 1925), *rev'd on other grounds*, 272 U.S. 554, 560 (1926) (it is rare case where total acquisition of stock could be seen as investment).

¹⁰³ *Erie Sand & Gravel Co. v. FTC*, 291 F.2d 279 (3d Cir. 1961); *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 45 (D.D.C. 1958), *rev'd in part on other grounds*, 362 U.S. 458 (1960).

¹⁰⁴ 38 Stat. 732 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964); see *Bender v. Hearst Corp.*, 152 F. Supp. 569, 578-79 (D. Conn. 1957), *aff'd*, 263 F.2d 360 (2d Cir. 1959) (acquisition from individual).

¹⁰⁵ HULBERT 21. As a general matter, state statutes define agricultural cooperatives or associations as corporations. See, e.g., IND. ANN. STAT. § 15-1602(c) (1964); IOWA CODE § 499.2 (1962); MINN. STAT. § 308.42 (1961); OHIO REV. CODE ANN. § 1729.01(B) (Page 1964); WYO. STAT. ANN. § 17-164(3) (1965).

¹⁰⁶ For a discussion of the structural aspects of unincorporated cooperatives, see HULBERT 236-42.

features, there might be an argument that section 7 would apply to them as well.

To facilitate the analysis of the situations in which cooperatives may be faced with section 7 prosecutions, cooperative acquisitions have been divided into three categories: acquisition of "outsiders," inter-cooperative acquisitions and mergers,¹⁰⁷ and acquisitions occurring in the form of a federation of cooperatives. As a practical matter these categories may not always be obvious in a particular situation, as there may be some acquisitions that shade into more than one of these divisions.

1. Acquisition of "Outsiders"

An Attorney General's opinion delivered in 1930¹⁰⁸ seemed to indicate that agricultural cooperatives had been granted complete immunity from the antitrust laws. Nine years later, however, the Supreme Court held otherwise. In *United States v. Borden Co.*¹⁰⁹ the Court held that joint activities of cooperatives and noncooperatives were outside any statutory immunity afforded cooperatives. In *Borden* a milk producers' cooperative was found to have violated section 1 of the Sherman Act by its conspiracy to fix prices with a milk truck drivers' union and a group of milk distributors. The Court reasoned that by engaging in transactions with noncooperative interests the cooperative had stepped outside the area of special statutory treatment and was subject to the antitrust laws just as any noncooperative business would be.¹¹⁰

Apparently in reliance on the *Borden* holding, the Department of Justice maintained that a cooperative should receive no special treatment where it attempted to enhance its market share through activities other than those authorized by section 1 of the Capper-Volstead Act.¹¹¹ The *Borden* decision was still the leading case on cooperative antitrust immunity when the Justice Department's test case, *Maryland & Va. Milk Producers Ass'n v. United States*,¹¹² reached the Supreme Court in 1960. The *Maryland & Virginia* case involved a cooperative composed of some two thousand milk producers with a net worth of nearly five million dollars. The cooperative supplied eighty-six per cent of the milk bought by dealers in the District of Columbia. In 1954 the cooperative acquired substantially all the assets of an operating dairy processing plant and in 1957 acquired all the outstanding capital stock of another plant. The government charged that these acquisitions violated section 7 of the Clayton Act. The cooperative entered an affirmative defense that it was immune from the operation of section 7 because of the provisions of section 6 of the Clayton Act and the Capper-Volstead Act. The federal district court applied traditional rules of statutory construction and arrived at the conclusion that sec-

¹⁰⁷ The term "inter-cooperative acquisition" is used to designate the situation in which a cooperative acquires an asset from another cooperative but does not merge it.

¹⁰⁸ 36 OPS. ATT'Y GEN. 326, 333 (1930).

¹⁰⁹ 308 U.S. 188 (1939).

¹¹⁰ *Id.* at 203-05.

¹¹¹ ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 309-11 (1955).

¹¹² 362 U.S. 548 (1960).

tion 7 of the Clayton Act was meant to limit the antitrust immunity conferred by the Capper-Volstead Act.¹¹³ The rationale of the district court was that since there was no clear repugnancy between the statutes, they should be construed so that both statutes would be effective.¹¹⁴

In measuring the probable anticompetitive effects of the cooperative's acquisitions, the district court found that the District of Columbia and parts of nearby Maryland and Virginia constituted a single geographic market for the distribution of milk and that the relevant product market was fresh fluid milk. There were twelve dairies in the geographic market, eight of which purchased substantially their entire supplies of raw milk from the cooperative. The challenged acquisitions involved purchases by the cooperative of two of the other four dairies. The 1954 acquisition, Embassy Dairy, Inc., was the fourth largest dairy in the area, accounting for about nine-and-a-half per cent of the milk sales in the market. It purchased its milk from some one hundred twenty independent producers. After acquiring Embassy Dairy, the cooperative continued to operate it as a retail business.

The district court found that the probable effect of the Embassy acquisition was to lessen competition in several respects.¹¹⁵ Competition for the purchase of raw milk from producers was likely to be diminished by eliminating Embassy as a purchaser. Competition for sale of milk to government facilities was likely to be reduced because Embassy had consistently under-bid dealers who purchased their milk from the cooperative. Since the cooperative could now force those producers who had previously sold to Embassy to join it or enter another market, the cooperative's influence on the market would probably increase. It was considered to be immaterial that there had been no increase in the price of milk after the acquisition, since prices might have decreased if there had been no such acquisition.¹¹⁶

The district court considered the acquisition to have had such a probable adverse effect on competition that it constituted a violation of section 7.¹¹⁷ As in *Brown Shoe*, the court placed reliance on the purposes of the parties as an indication of probable anticompetitive effects. It found that the acquisition was carried out because of its competition-reducing propensities rather than as a mere expansion of the cooperative's operations. Judgment was entered ordering the cooperative to divest itself of all interests it had acquired in Embassy Dairy in such a manner as to leave Embassy Dairy a separate going business.¹¹⁸ The antitrust laws were applied as though the defendant was an ordinary noncooperative corporation. The district court reached this result by following the *Borden* doctrine as to dealings with noncooperative interests.¹¹⁹

¹¹³ 167 F. Supp. 45, 53 (D.D.C. 1958).

¹¹⁴ *Ibid.*; accord, *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939).

¹¹⁵ 167 F. Supp. at 53.

¹¹⁶ *Id.* at 51-52.

¹¹⁷ *Id.* at 53.

¹¹⁸ Although this is not included in the district court's opinion, the Supreme Court quoted from the judgment of the district court when the question of the adequacy of relief arose. 362 U.S. 458, 472-73 (1960).

¹¹⁹ 167 F. Supp. at 51-52.

On appeal, the Supreme Court stated that section 6 of the Clayton Act and the Capper-Volstead Act were intended to give farmers the freedom to act through cooperative associations with the same competitive advantages and responsibilities as other businesses organized in the corporated form.¹²⁰ There was a summary dismissal of the argument that section 2 of the Capper-Volstead Act, by giving enforcement powers to the Secretary of Agriculture, had precluded other antitrust prosecutions. The Court found, however, that although the Secretary might confer antitrust immunity in certain situations with his power to enter into marketing agreements, he had no statutory power to authorize the acquisition in question.¹²¹ The district court's finding of a section 7 violation and its divestment order were upheld.¹²² Consequently, *Maryland & Virginia* makes it clear that antitrust immunity for cooperatives under section 7 does not extend to the acquisitions of outside, noncooperative interests.¹²³

2. Inter-Cooperative Mergers and Acquisitions

The merger of cooperatives can quite clearly result in a vertical integration that may have an adverse effect on competition. A cooperative that has carried on a program of backward integration might merge with another that has emphasized an intensive program of forward integration. There may also be a merger of cooperatives that have concentrated on successive levels of the production-marketing process. Likewise, the acquisition of assets by another cooperative may vertically integrate the acquiring organization.

Although there have been no cases prescribing the treatment to be accorded inter-cooperative mergers or acquisitions under section 7 of the Clayton Act, some cases have dealt with such activity and its effect upon the antitrust exemption under the Sherman Act.¹²⁴ In *United States v. Maryland Co-op. Milk Producers Ass'n*,¹²⁵ a prosecution of two producers' cooperatives under section 1 of the Sherman Act for unlawful combination and conspiracy to fix prices, the Court said that "it seems immaterial whether a large group of farmers organizes a single organization or divides itself into several organizations."¹²⁶ The Court seemed to reason that since section 6 of the Clayton Act

¹²⁰ 362 U.S. at 463-67.

¹²¹ *Id.* at 469-70; see note 60 *supra*.

¹²² 362 U.S. at 472-73.

¹²³ The *Maryland & Virginia* case has subsequently been cited in cases finding cooperative violations of § 2 of the Sherman Act for the proposition that outside their narrow sphere of antitrust protection, the cooperatives will be treated as any other business. *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 193-94 (5th Cir. 1965) (\$1,095,000 treble damages award entered against the cooperative); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 482 (E.D. Mo. 1965) (injunction against the cooperative granted).

¹²⁴ See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962); *United States v. Maryland Co-op. Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956).

¹²⁵ *Ibid.*

¹²⁶ *Id.* at 154.

legitimizes certain farm associations in general,¹²⁷ the antitrust statutes would not have restricted the ability of the association's members to organize initially along the lines of the new structure. Consequently, the Court held that the cooperatives were exempt from prosecution under section 1 of the Sherman Act so long as the combination or conspiracy complained of involved no noncooperative interests.

This case could be interpreted to mean that cooperatives are free to conspire among themselves, and may combine or splinter at will without fear of Sherman Act prosecution. Although this would appear to be logical as to the organizational membership of the association, a cooperative merger involves more than the merger of memberships. The merger device also allows the cooperative to possibly extend its degree of vertical integration in a single transaction with harmful competitive effects. A distinction must be drawn between the merger of cooperative memberships into a single association and the pouring together of the assets and interests of the several cooperatives involved. There are no apparent statutory restrictions on the voluntary organization of all the farmers in a market into a single association.¹²⁸ However, section 7 may operate to limit the power of one cooperative to merge or acquire the assets of another. This observation is supported by the Supreme Court's decision in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*,¹²⁹ a private action against three cooperatives for an alleged monopolization and a conspiracy to restrain and monopolize trade in violation of sections 1 and 2 of the Sherman Act. According to the Supreme Court, the issue in *Sunkist* was whether the three cooperatives could "be considered independent parties for the purposes of the conspiracy provisions of sections 1 and 2 of the Sherman Act."¹³⁰ One of the cooperatives, Sunkist, was an area-wide marketing association. Its members were local growers' cooperatives. The other two cooperatives were organized by associations which were members of the Sunkist group to perform specialized research and processing activities. The Court, holding that economically the three cooperatives were one and must be treated as a single organization for antitrust purposes, stated:

To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.¹³¹

This language indicates that only parties which are joined together in a single association may claim immunity from a conspiracy suit under the Sherman Act. In other words, there may be intra-coopera-

¹²⁷ "[N]or 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." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

¹²⁸ *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954).

¹²⁹ 370 U.S. 19 (1962).

¹³⁰ *Id.* at 27.

¹³¹ *Id.* at 29.

tive immunity but no inter-cooperative immunity. It also suggests that if a case were to arise involving a combination or conspiracy between cooperatives which were independent of each other and their independence had "economic significance in itself," or if outsiders dealt with them as independent organizations, the Court would find a Sherman Act violation. Since section 7 of the Clayton Act is designed to arrest corporate transactions before they reach the proportions condemned by the Sherman Act, the *Sunkist* case can be used to suggest the type of treatment which inter-cooperative acquisitions and mergers will be accorded under section 7. There is no reason to suggest that the Sherman Act should be applied any differently than the Clayton Act in this type of situation.

Utilizing the *Sunkist* guidelines, it appears that a cooperative can merge with or acquire the assets of another cooperative without any fear of a section 7 violation if the parties involved in the transaction constitute a single economic unit prior to the transaction and are treated as such by outsiders. However, many inter-cooperative transactions are likely to involve cooperatives that would appear to be economically independent of each other and, perhaps, subject to the section 7 proscriptions. In such a case, the transaction will be tested under the statutory standard of illegality—will the merger or acquisition substantially lessen competition or tend to create a monopoly?¹³²

3. Federated Cooperatives

A federated cooperative is a central association which generally represents a group of local cooperatives. Each local or individual cooperative participating in the federation acquires a percentage ownership in the federated association and makes use of its centralized functions.¹³³ Although there is no express statutory authorization for extending cooperative immunity to a federated cooperative, the language of the Capper-Volstead Act, at least by implication, would allow the federation to claim cooperative immunity.¹³⁴ The statute specifically allows cooperatives to have "marketing agencies in common,"¹³⁵ and, as a general matter, the federated cooperative is a common agency which serves this marketing function for its cooperative members. In addition, the Cooperative Marketing Act of 1926 contained specific provisions for an exchange of information between cooperatives "or federations thereof."¹³⁶

Although the *Sunkist* case¹³⁷ involved a federation of cooperatives, the Court did not recognize any problem arising from the federated nature of the parties, perhaps on the ground that the statutes granting cooperative immunity imply immunity for the federation of cooperatives as well. There is nothing in section 7 indicating that federated

¹³² See notes 83-101 *supra* and accompanying text.

¹³³ See Note, *Agricultural Cooperatives and the Antitrust Laws: A New Departure*, 36 IND. L.J. 497, 508 (1961).

¹³⁴ See *ibid.*; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 308 (1955); 36 OPS. ATT'Y GEN. 326 (1930).

¹³⁵ 42 Stat. 388 (1922), 7 U.S.C. § 291 (1964).

¹³⁶ Ch. 725, § 5, 44 Stat. 802 (1926), 7 U.S.C. § 455 (1964).

¹³⁷ 370 U.S. 19 (1962).

cooperatives are to be treated any differently than individual cooperatives.¹³⁸ Thus, following the *Sunkist* position, and analogizing to the immunity accorded individual cooperatives, a federation would not violate section 7 by its act of federation since this would be analogous to the original organization of the individual cooperative, and as such an intra-organization transaction. The same would hold true of adding members to the federation. The only possible violation of section 7 under this approach would arise when one federation attempted to merge or acquire another federation. However, this approach would enable cooperatives to defeat any application of section 7 to mergers of individual cooperatives since they could simply form a federation and, after waiting a period of time, merge. The merger would be an intra-organizational transaction, immune under the extension of immunity to federations. This position would also circumvent any application of section 7 to intra-federation mergers or acquisitions between individual member cooperatives. It is at least doubtful that such complete immunity was intended either by the statutes or by the Court in *Sunkist*. It might be wiser to limit the immunity of a federation to exactly those functions which the act clearly implies, such as marketing arrangements, rather than make its immunity coextensive with that applicable to individual cooperatives. The combination of the assets of the member cooperatives and the central cooperative may, like the combination of assets in a merger, have an adverse effect on competition substantial enough to violate the section 7 prohibition. Therefore, it would be preferable for the courts to evaluate the anticompetitive effects of the combination by examining the same factors involved in an inquiry of an inter-cooperative acquisition or merger.¹³⁹ Consequently, in spite of their implied freedom to federate, cooperatives may violate section 7 by federating if the effect of the federation is to substantially lessen competition. Thus, as in the case of a cooperative merger, the leadership of a proposed federation should attempt to measure the probable effects on competition which any contemplated combination would have.

In all instances, it should be kept in mind that the legality of the acquisition of the ownership shares in the federation by the cooperatives will depend upon the probable future anticompetitive effects of the vertical integration, determined at the time of trial, not at the time of the acquisition.¹⁴⁰ This may make it more difficult to predict the legality of a proposed federation. Management will be forced to consider trends in the market and possible future competitive conditions in order to estimate the probable degree of future adverse effects on competition. Although this may be a heavy burden, it is no greater than that imposed on noncooperative corporations.

V. CONCLUSION

Present antitrust laws reflect the congressional theory that economic concentration in the hands of a few is more harmful than beneficial.

¹³⁸ See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 308 (1955).

¹³⁹ See notes 124-32 *supra* and accompanying text.

¹⁴⁰ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 332-33 (1962); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589, 597 (1957).

When cooperatives were given special treatment under these laws the cooperative movement was viewed as a desirable method of consolidating the interests of countless small farmer-businessmen. Congressional policy still seeks to encourage the small business, but the cooperatives in the American economy have outgrown their need for special protection. Cooperatives today are big business. The courts are beginning to recognize this fact, and hopefully, the American cooperative interests will be managed in such a manner as to justify the recognition given their unique problems during their initial development.