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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Using a limited liability company to operate a Pennsylvania family farm business

Court Of Federal Claims considers water right "takings" issues

The United States Court of Federal Claims recently issued an opinion in the matter of *Tulare Lake Basin Water Storage District, et al, v. The United States*, No 98-101L, 2001 U. S. Claims LEXIS 72 (Fed. Cl. Apr. 30, 2001) on cross-motions for summary judgement on liability. The court found that imposing restrictions on contractual rights to the use of water to satisfy the requirements of the federal Endangered Species Act is equivalent to a physical invasion of property by the government for which compensation is owed under the Fifth Amendment. In reaching that conclusion, the court considered the primary arguments on either side of the controversy surrounding restrictions on water use to protect an environmental concern. For that reason it offers an interesting and informative read for someone who might become involved in such a case.

Many have wondered whether restricting use of a water right to satisfy an environmental concern could be construed as a taking in a state where a permitting system has been interposed over riparian or prior appropriation water right systems or where contracts are involved. The first concern has been whether or not any property is taken when water use is restricted in a permitting system. The court reviewed California law on water rights and determined that title to the water remains with the state, giving the permit holder only the right to use the water. That did not cause an impediment to a takings claim in this case. Further, in *Tulare*, the water rights were transferred to end-users by contract. The court noted that the contracts conferred on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of the permits. That right would remain in place until formally changed by administrative process. The court concluded that the contract rights to the use of the water were superior to all competing interests. In the eyes of the court, the right to use the water was a sufficiently matured property interest and not a mere contract expectation.

It has been argued that it might be difficult to prosecute a takings claim where the permit or contract is restricted but not cancelled. The court concluded that a restriction on use of a water right effects a complete taking of that property interest. It decided that, in contrast to other types of property where use restrictions may limit some but not all of the incidents of ownership, the denial of the right to use

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Farm income, farm program payments

In 2000, federal farm program payments totaled $22.1 billion, the highest in history. Over one-half of this sum consisted of emergency assistance ($8.9 billion) and loan deficiency payments ($6.4 billion). Mitchell Morehart et al., *Farm Income and Finance: The Importance of Government Payments* (USDA Outlook Forum, Feb. 22, 2001) at 1. Partially as a result of these payments, net farm income in 2000 was $45.4 billion, slightly exceeding the 1990-2000 average of $45.3 billion. *Id*. Without these payments, total farm production expenses would have equaled about 89 percent of the final agricultural sector output. This output includes income from crops, animals, forest products, machine hire and custom work, other farm related income, and the imputed rental value of farm dwellings. When these payments are included, the ratio of production expenses to final sector output improves by about 8 percent, bringing production expenses down to about 81 percent of agricultural output. *Id*. at 2. This improvement in operating margins resulting from farm program payments was exceeded only in 1987, when payments improved operating margins by 8.75 percent. *Id*.

The number of farms receiving program payments has increased. In 1998, 36 percent of farms reported receiving payments. In 1999, this percentage rose to 41.6 percent. *Id*. Over the same two-year period, average per-farm payments increased from $11,864 to $16,751. *Id*. In 1999, farms that received program payments had gross cash income

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water accomplishes a complete elimination of all value. It determined that by limiting plaintiffs' use of water to which it would otherwise be entitled, the government was substituting itself as the beneficiary of the contract rights and displacing the contract holder, thereby effecting a physical taking of the property interests.

Another concern has been whether or not restricting use of a water use permit conditioned by such concepts as reasonable use, public nuisance, or public trust could ever be a taking. The court recognized that the state could conclude that a use would violate public interest restraints, but that no such state decision had been made in this case. The court refused to make that determination on behalf of the state and, therefore, refused to recognize those principles as a defense. In other words, where there was no state public interest determination prior to the restriction, the restriction effected a taking. If that principle holds through to the conclusion of the case and on appeal, then it will leave open the question of whether or not a taking could be avoided by simply imposing a timely and complete state public interest determination.

The proposition that a taking might be avoided by an acceptable public interest review raises other questions. What would be the standard for review of a decision on that issue? Would a court be required to ask whether the exercise of the police power was proper? If so, then an agency might find itself faced by a due process analysis of what had seemed like a straight-forward decision based on a simple environmental rule requiring termination of a water use.

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Payments/*Cont. from p. 2*

greater than $88,000, more than twice the same figure for farms that did not receive payments. *Id*.

Not all farms received average payment amounts, however. Farms categorized by the USDA as “very large family farms” averaged $85,208 in program payments. Farms in this category accounted for only 4 percent of farms receiving payments, yet they received 23 percent of the total payments distributed. At the other end of spectrum, limited-resource farms, which also accounted for 4 percent of the farms receiving payments, received less than 1 percent of total program payments. The majority of American farms that received payments, about 56 percent, are classified by the USDA as “residential/lifestyle” farms and “farming occupation/lower sales small family farms.” These farms received only 23 percent of the total payments. *Id*. at 3.

In 1999, more than a third of the payments went to farms in the Heartland region, consisting of Iowa, Illinois, Indiana, and parts of some adjoining states. This region and the Northern Great Plains region had the largest share of farms receiving payments. The largest payments per-farm, however, were in the Fruitful Rim region, consisting of much of California and Arizona, and the Mississippi Portal region, consisting primarily of the Mississippi Delta regions of Louisiana, Mississippi, Arkansas, and Tennessee. The 3.9 percent of farms receiving government payments that were in the Mississippi Portal received 6.7 percent of total payments. *Id.*

Farm program payments tend to improve farm finances, but not invariably enough to produce a favorable economic outcome. The USDA uses the rate of return on assets (ROA) and off-farm earnings to define an unfavorable financial outcome. Under its standard, a farm with a ROA of less than -5 percent or off-farm earnings of less than $20,000 and a farm business ROA between -5 and 5 percent has an unfavorable financial outcome. By this measure, 44 percent of all farms had an unfavorable economic outcome in 1999. In the same year, 42 percent of all farms that received farm program payments had an unfavorable financial outcome. The percentage for farms that did not receive payments was 45 percent. *Id*. at 3-4.

Farm program payments do more than provide income support; they are also capitalized into farmland values. This may have contributed to the fact that land values have continued to increase, although at lower rates than in the recent past. In 2001, farm land values nationwide are expected to increase by 1 percent. As a result of increases in land values and conservative attitudes toward debt, farm business equity was unchanged in 2000, leaving a projected debt-to-asset ratio for that year and 2001 at 16.1 percent. *Id*. at 4.

Among the beneficiaries of the capitalization of program payments into land values are farmland owners who are not farm operators. Non-operator landlords own about 45 percent of all the nation’s farmland. Through share-leasing and other arrangements, these landlords can also receive program payments. In 2000, for example, the USDA estimates that these landlords received about 12 percent of loan deficiency payments and about 15 percent of all other direct program payments. *Id*. at 5.

Currently, farm income is expected to decline in 2001. Although commodity values are trending upward, existing legislation does not provide for the same level of income support as Congress provided in 2000. Production flexibility contract payments for fiscal year 2001 are $1 billion lower than for fiscal year 2000 and about $122 million lower in fiscal year 2002 compared to the previous fiscal year. Loan rates applicable to marketing assistance loans and loan deficiency payments will be declining because they are based on a moving average of market prices. When this decline is coupled with the modest increases in market prices expected for some commodities, the result will be smaller amounts of the crop eligible for loan deficiency payments and lower per-unit payment rates. The likelihood that Congress will act to either supplement previously authorized appropriations or to provide other mechanisms for income assistance appears strong, however. Since 1996, Congress has provided about $70 billion in direct payments to support farm income, and the recent trend has been to increase this assistance.

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Capper-Volstead/*Cont. from p. 5*

market. All of these producers agreed to sell all of their milk through the association at a price set by the association. As a result, the association controlled milk prices in this particular market.

Such behavior would have antitrust consequences for a non-Capper-Volstead association. Both elements of Sherman Act § 2 monopolization would be present. First, the association would have monopoly power; that is, "the power to exclude competitors or control prices within a relevant market." Second, the association would have intentionally acquired monopoly power through anticompetitive conduct; here, price-fixing in violation of Sherman Act § 1.[5] However, because members of Capper-Volstead associations may fix the prices of their products and the association in this example did not use predatory practices to attain its intended monopoly status, the association would not have violated § 2 of the Sherman Act.

Economic theorists, however, would contend that this association's monopoly power would be tenuous at best because of the "mobility" of its producer-members who remain free to disassociate from the organization if any competing cooperative entered the market and offered a better return. Also, if the association priced its members' milk too high, the membership would likely produce more milk than could be sold. The prevailing view is that Capper-Volstead associations must be "quantity takers"; that is, they cannot control member production. Members whose milk could not be sold might be tempted to leave the cooperative and either sell directly or form another cooperative that would capture market share by selling at a lower price than the monopolist association.

Capper-Volstead associations may not engage in discriminatory pricing within the scope of the Robinson-Patman Act. Section 4 of the Robinson-Patman Act excludes patronage refunds from its scope, but the other proscriptions in the Act apply to Capper-Volstead associations.

Capper-Volstead associations that sell products to persons who resell the products are probably subject to the same restraints as to resale price maintenance and other vertical restraint of trade restrictions as are other business organizations. This would certainly appear to be the case when the concerted action required for a § 1 Sherman Act violation involves a non-Capper-Volstead Act association. For example, in *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), the court held that the Capper-Volstead Act did not protect a dairy cooperative that conspired with retailers to fix the resale price of milk.

Section 2 of the Capper-Volstead Act (7 U.S.C. § 292)

Section 2 of the Capper-Volstead Act gives the Secretary of Agriculture authority to direct Capper-Volstead associations to cease and desist from activities that cause undue price enhancement. The Act does not define "undue enhancement." The Secretary has never enforced § 2 other than to investigate a few complaints of undue price enhancement. Section 2 does not give the Secretary primary jurisdiction. It is "auxiliary" and does not supplant enforcement actions under the Sherman Act.

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[1] These cases have been said to stand for the proposition that the Capper-Volstead Act "encompasses only producers of raw agricultural products . . . ." 6 Julian O. von Kalinowski, *Antitrust Law and Trade Regulation* § 51.03[1] (1995).

[2] The weight of authority requires proof of predatory conduct by a Capper-Volstead association in attempt to monopolize cases. *E.g., Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980). A leading antitrust treatise, however, takes the position that proof of predation should not be required in all Sherman Act § 2 attempt to monopolize cases with respect to Capper-Volstead associations. Finding support for their position in *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981), its authors contend that "[i]f the conduct is knowingly and intentionally exclusionary, and is more than mere growth in size or market power through offering cost savings, information collection and dissemination, or attractive marketing and sales opportunities to farmers, then such conduct ought not be permitted to cooperatives even if it would not rise to the level of predation." They also point out that one of the difficulties with insisting on proof of predation is the absence of a clear standard as to what constitutes predation. 9 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 71.8 (1989). Someday the Supreme Court may address this issue.

[3] A Sherman Act § 2 attempt to monopolize requires proof of (a) a specific intent to gain a monopoly; (b) a dangerous probability of success in achieving a monopoly; and (c) conduct toward that end, usually predatory conduct. Market shares ranging from 40% to 60% prior to the commencement of a predatory strategy are generally required. A Sherman Act § 2 conspiracy to monopolize offense requires proof of (a) a combination or conspiracy; (b) a specific intent on the part of the conspirators to make one firm a monopolist; and (c) overt acts in furtherance of the conspiracy. Monopoly power is not required but is relevant to specific intent Daniel M. Wall, *A Step-By-Step Approach to Monopolization under Section 2 of the Sherman Act in* D.C. 97: Antitrust Fundamentals 41-42 (ABA Antitrust Sec. Proceedings 1997)

[4] Ordinary corporations can be guilty of monopolization if they acquired monopoly power though intentional conduct, even otherwise honest and non-predatory conduct, as opposed to having acquired it from "growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Capper-Volstead associations, on the other hand, may become monopolies so long as they do not engage in exclusionary or predatory conduct.

[5] It is assumed here that the fixing of prices by the non-Capper-Volstead association is done by the association's members. The unilateral setting of prices by an ordinary corporation, even a monopolist corporation, is not price-fixing under Sherman Act § 1. Where ordinary corporations with monopoly power get into Sherman Act § 2 trouble with respect to prices is predatory pricing. "In general, courts have held that proof of pricing below marginal or average variable costs is presumably predatory and thus the burden of proof is on the defendant to show that the price was promotional or that his costs were expected to fall." Ernest Gellhorn, *Antitrust Law and Economics in a Nutshell* 145-46 (3rd ed. 1986). Thus, if the facts in this example were changed so that the non-Capper-Volstead association was an ordinary corporation engaged in predatory pricing, the result would be the same: a Sherman Act § 2 violation.

Eligibility/*Cont. from p. 7*

that "an honest attempt" was made to make the payments. *Id.*

[14] 7 C.F.R. § 1943.12(a)(5). The regulation states that this includes, but is not limited to "providing current, complete and truthful information when applying for assistance and making every reasonable effort to meet the conditions and terms of the proposed loan." *Id.*

[15] 7 C.F.R. § 1941.12(a)(5). The regulation states that this includes, but is not limited to "providing current, complete and truthful information when applying for assistance and making every reasonable effort to meet the conditions and terms of the proposed loan." *Id.*

[16] 7 U.S.C. § 1922(a)(4); 7 C.F.R. § 1943.12(a)(6).

[17] 7 U.S.C. § 1941((a)(4); 7 C.F.R. § 1941.12(a)(6).

[18] 7 U.S.C. § 1922(a)(3); 7 C.F.R. § 1943.12(a)(7).

[19] 7 U.S.C. § 1941(a)(3); 7 C.F.R. § 1941.12(a)(7) (inapplicable to youth loan eligibility).

[20] Statutory requirement added as a result of the Debt Collection Improvement Act of 1996; 7 C.F.R. § 1943.12(a)(11).

[21] Statutory requirement added as a result of the Debt Collection Improvement Act of 1996, but also specifically required under 7 U.S.C. § 2008h(a); 7 C.F.R. § 1941.12(a)(11).

[22] 7 U.S.C. § 1924.74; 7 C.F.R. § 1943.12(c). There is a provision for a waiver of this requirement.

[23] 7 U.S.C. § 1924.74; 7 C.F.R. § 1941.12(c). There is a provision for a waiver of this requirement.

[24] The operation of an enterprise by a youth under 7 U.S.C. § 1941(b) is not considered the operation of a farm or ranch for purposes of this requirement. 7 U.S.C. 1922(b)(3).

[25] 7 U.S.C. § 1922(b)(1); 7 C.F.R. § 1943.12(a)(8).

[26] 7 U.S.C. § 1922(b)(3); 7 C.F.R. § 1943.12(a)(9).

[27] 7 U.S.C. § 1941(c)(1). For purposes of this restriction, a youth loan is not considered a direct operating loan. 7 U.S.C. § 1941(c)(2).

[28] 7 U.S.C. § 1941(c)(3); 7 C.F.R. § 1941.12(a)(9).

[29] 7 C.F.R. § 1941.12(a)(9).

[30] Pub. L. No. 106-224, § 255 (suspending 7 U.S.C. § 1941(c)).

[31] 7 U.S.C. § 2008h(b)(1).

[32] 7 U.S.C. § 2008h(b)(1).

[33] 7 U.S.C. § 2008h(b)(2).

[34] Administrative Notice, FLP-Notice 205 (issued on May 1, 2001) (available on the Internet at ftp://ftp.fsa.usda.gov/public/notices/FLP_205.pdf).

[35] 66 FR 1570 (interim final rule) (Jan. 9, 2001) (amending 7 C.F.R. pts. 1910, 1941).

[36] *Id.*

[37] *Id.*

[38] *Id.*

Notes on the Capper-Volstead Act of 1922

By Christopher R. Kelley

The Capper-Volstead Act, 7 U.S.C. §§ 291-292, provides qualifying farmer associations with limited antitrust immunity. It was intended to expand the immunity already provided under section 6 of the Clayton Act, 15 U.S.C. § 17, by covering stock associations and by allowing qualifying associations to perform certain marketing activities without antitrust consequences. This article provides an overview of the Act and the most significant judicial interpretations of it.

Section 1 of the Capper-Volstead Act (7 U.S.C. § 291)

An association seeking the limited immunity provided by the Act must satisfy certain organizational and operational requirements imposed by the Act. First, with respect to the association's membership, the association must be formed by "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers...." 7 U.S.C. § 291. The term "persons" is not restricted to natural persons. It includes producers organized as farm LLCs and farm corporations. *See* Harold M. Carter, *Antitrust Aspects of Agricultural Cooperatives in* 14 Neil E. Harl, Agricultural Law § 137.04[2](b) (1994)[hereinafter Carter].

"Persons engaged in the production of agricultural products" includes landowners who lease their land on a "crop-share," at-risk basis, and their share-lease tenants. On the other hand, persons who only process or pack agricultural products are not persons so engaged. *National Broiler Marketing Ass'n v. United States,* 436 U.S. 816 (1978); *Case-Swayne Co., Inc. v. Sinkist Growers, Inc.*, 389 U.S. 384 (1967).[1]

The issue of whether fully integrated processors who themselves actually perform 100% of the "grow-out" function are such persons has not been resolved by the Supreme Court. The most recent lower court decision touching on that issue is *United States v. Hinote*, 823 F. Supp. 1350 (S.D. Miss. 1993). There the court followed the analysis offered by Justice Brennan in his concurring opinion in *National Broiler Marketing Ass'n* to hold that fully integrated catfish processors, who obtained catfish under "grow-out" contracts, from their owned and leased catfish ponds, and by purchase from independent catfish farmers, were not "farmers" for purposes of the Act. In essence, the court grounded its holding on the fact that it was "not the activity [price fixing] of the processors acting as farmers that is being challenged in this case, but rather it is their conduct in selling the finished catfish products that is the subject of the case." *Id*. at 1359. To hold otherwise, the court reasoned, would mean that "large integrated agri-businesses organized to market and sell agricultural products could exempt themselves from the antitrust laws by the simple expedient of purchasing and/or leasing some interest in a farming operation, no matter how de minimis the interest," thus undermining the purpose of the Sherman Act and the Capper-Volstead Act. *Id*. *See also* Worth Rowley & Martin Beshore, *Chicken Integrators' Price-Fixing: A Fox in the Capper-Volstead Coop*, 2 Agric. L. J. 385, 409 (1980)(arguing that "[i]f the integrator assigns out the risk at any stage of production he should not be considered the producer of that product or commodity and his Capper-Volstead status should be assessed accordingly. Integrators should not be allowed to obtain the efficiencies of a segmental production chain and maintain producer status without assuming the primary risk at all points.") *But see* Charles Gordon Brown, *United States v. National Broiler Marketing Association: Will Chicken Lickin' Stand?*, 56 N.C. L. Rev. 29 (1978)(arguing in favor of including associations of integrators within the Capper-Volstead Act's protection).

All members of the association must be persons so engaged. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1986); *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978). As the Court announced in *National Broiler Marketing Ass'n*, "It is not enough that a typical member qualify, or even that most ... members qualify."*National Broiler Marketing Ass'n*, 436 U.S. at 822-23. The requirement that all of the association's members must be producers of agricultural products is probably not so rigorous that such a membership must be consistently maintained daily. Nonetheless, a prudent association will act promptly in terminating the membership of members who cease to be producers. *See Alexander v. National Farmers Org.,* 687 F.2d 1173, 1185-87 (8th Cir. 1982)(ruling that a cooperative did not forfeit Capper-Volstead protection because a small number of non-producers who did not have decision-making authority were admitted through oversight or error). "Membership" generally means to right to vote or to exercise an equivalent power in the governance of the association. *See Agritronics Corp. v. National Dairy Herd Ass'n*, 1994-2 Trade Cas. (CCH) ¶ 70,758 (N.D.N.Y. 1994)

As to the organizational form and general operation of an association qualifying for the Act's limited immunity, the Act uses the term "associations," not "cooperatives." 7 U.S.C. § 291. Thus, assuming all other requirements are met, a limited liability company, could be a qualifying "association." *See* Donald A. Frederick, *The Impact of LLCs on Cooperatives: Bane, Boon, or Non-Event?* 13 J. Cooperatives 44, 47 (1998). The association may be "corporate or otherwise." 7 U.S.C. § 291. The association may be a stock or non-stock association. *Id*. However, in any case, the association must operate for the mutual benefit of its members. *Id*. In addition, the association must operate on a one member-one vote basis *or* not pay dividends on stock or membership capital in excess of 8% per annum. *Id*. Finally, "The association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." *Id*. This final operational requirement means that Capper-Volstead associations must keep accurate records of their member and nonmember dealings.

The Act provides that "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations... in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce such products of persons so engaged." *Id*. These activities do not expressly include purchasing, supply, or service functions. Whether the phrase "preparing for market" is broad enough to include providing production inputs has not been answered by a court. Some commentators, however, have answered the question in the negative. *E.g.,* Carter, *supra,* at § 137.04[2][b]. Assuming the Act does not apply to supply associations, many such associations may nonetheless survive antitrust scrutiny. Under § 1 of the Sherman Act, an agreement between buyers as to the prices they will demand in their separate negotiations is illegal per se. However, true joint purchasing arrangements are tested under the rule of reason and are generally upheld if the participants are not capable of exercising market power. There have been two Supreme Court cases that can be read as implicitly approving joint buying cooperatives, at least where the percentage of the market represented by the group's purchases is relatively small. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985)(noting that

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"[w]holesale purchasing cooperatives ... are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'"); *United States v. Topco Associates*, 405 U.S. 596, 598 (1972).

The Act also does not contain the term "producing." Thus, strictly construed, the Act could be held to authorize only joint action looking toward the disposition of produced commodities and not to sanction joint action or control with respect to production by individual members. Consistent with this construction, the prevailing view, including that of the USDA, is that Capper-Volstead associations cannot control their members' agricultural production. *See* Carter, *supra*, at § 137.06[8].

The expressly authorized activities–processing, preparing for market, handling, and marketing–must relate to "such products of persons so engaged." Products purchased by members and delivered to the association, even if the purchaser is a producer of such products, are likely to be characterized as "nonmember" products because they were not produced by the member. If the amount of value of nonmember products handled by an association exceeds the amount of value of member products, the association is ineligible for the Act's limited immunity. USDA, Farmer Coop. Serv., *Legal Phases of Farmer Cooperatives* 300-01 (1976).

The term "marketing" is broader than the term "sell" and includes an aggregate of functions, such as "bargaining for sales" to be made by the association's individual members and the setting of prices or price ranges to which members are required to adhere in their selling of their product. As to these two examples, the distinction between (1) the association negotiating the price directly with buyers and (2) the association presenting the results of its pricing decisions though each member is a "distinction without a difference." *Northern California Supermarkets, Inc. v. Central Lettuce Producers Cooperative*, 413 F. Supp. 984, 991-92 (N.D. Cal. 1976).

Capper-Volstead Act associations are expressly authorized by the Act to use marketing agencies in common. 7 U.S.C. § 291. It follows from this authorization–based on the principle that if the act of an agent is lawful, the same act performed by the principal is lawful–that qualified associations may act together directly, without a common agent, in marketing their respective members' products. *See, e.g.,* Carter, *supra*, at § 137.04[2].

The antitrust immunity afforded by the Act is limited. It is not a total exemption. In fact, the Capper-Volstead Act does not use the terms "antitrust" or "exemption." Instead, section 291 simply authorizes members of qualified associations to engage in the activities set forth in that section. The effect of this authorization is to remove antitrust restrictions that would otherwise apply.

It is well established that the members of Capper-Volstead associations may engage in horizontal price-fixing with respect to their products marketed through the association, an activity that would violate § 1 of the Sherman Act but for the Capper-Volstead Act. *See, e.g.,* Carter, *supra*, at § 137.06[6]. Capper-Volstead associations, however, may act only in furtherance of their "legitimate objects" if they wish to avoid antitrust liability. The "legitimate objects" test was announced in *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 465 (1960).

Under the "legitimate objects" test, Capper-Volstead associations may not act together with a non-Capper-Volstead entity in a manner that violates the antitrust laws. In other words, the limited immunity held by a Capper-Volstead association is lost if a party to the concerted action is an entity that does not qualify for the limited immunity granted by the Act. *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939) For antitrust purposes, an agreement (or other concerted action) between a Capper-Volstead association and an association that is not qualified for the Capper-Volstead Act's limited immunity is judged as if the agreement (or other concerted action) were between two parties who did not qualify for limited immunity under the Act.

Capper-Volstead associations also may not engage in "predatory practices," a phrase that is sometimes used broadly to describe anticompetitive and exclusionary conduct that is outside the limited immunity given by the Act. Whether an activity will be characterized as a predatory practice depends on the particular facts and circumstances. Though no definition of a "predatory practice" has achieved universal acceptance, it seems to mean "abnormal," perhaps not "honestly industrial," behavior directed at an identifiable actual or potential competitor or a group of them. Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 120-23 (2000). Examples of predatory conduct include secondary boycotts, threats of physical violence, and attempts to increase market share by giving secret rebates. However, less egregious conduct may also constitute exclusionary conduct that is outside of the Act's protection.[2]

"Predatory," "anticompetitive," or "exclusionary" conduct is the second element of a Sherman Act § 2 monopolization offense. It should be relevant only after the alleged offender's monopoly power has been established.[3] Nonetheless, some courts appear to presume that a large farmer cooperative has monopoly power simply because the Capper-Volstead Act permits qualifying associations to acquire monopoly power.[4] At least that is the assertion made in Thomas W. Paterson & Willard F. Mueller, *Sherman Section 2 Monopolization for Agricultural Marketing Cooperatives*, 60 Tulane L. Rev. 955 (1986). Messrs. Paterson and Mueller contend:

> Some courts inadvertently have used Capper-Volstead to make cooperative concerns more vulnerable to challenge for monopolization than similarly situated proprietary concerns. These courts often make an initial observation that a cooperative's large market share is permissible because of the Capper-Volstead exemption. The only issue, then, is whether the cooperative has engaged in predatory conduct. This seemingly benign approach has led some courts to assume implicitly that cooperatives with large shares must have monopoly power because of their privileged treatment under Capper-Volstead. This leads to a critical failure to examine whether sufficient barriers to market entry exist to actually permit the exercise of monopoly power by the cooperative. These examinations have become increasing central in both attempt to monopolize and monopolization cases involving proprietary corporations. Such examinations are essential in cooperative cases if farmers are to be given, "through agricultural cooperatives as entities, the same unified competitive advantage–and responsibility– available to businessmen acting through corporations as entities."

Id. at 993-94 (footnotes omitted). *But see* David L. Baumer, et al., *Curdling The Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 Villanova L. Rev. 183, 230 (1986)(contending that the "behavioral and empirical evidence compels a conclusion that [dairy] cooperatives with market shares in excess of sixty to seventy-five percent possess–and use–monopoly power").

This said, Capper-Volstead associations may intentionally acquire monopoly power without antitrust consequences, as long as they do not "prey" on others in acquiring or maintaining that power. For example, assume a Capper-Volstead association announced to the world that it was going to acquire a monopoly in milk production in a particular market. It then successfully solicited the voluntary enrollment of every milk producer in the

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Eligibility requirements for individuals: FSA direct loan programs

By Susan Schneider

The Farm Service Agency (FSA) direct loan program offers loans to family farmers on very favorable terms. Unfortunately, the eligibility criteria for these loans can be difficult to decipher. There have been statutory changes in recent years that first made the eligibility criteria more restrictive, and then changes that loosened the restrictions. For some criteria, although the statutory requirements were revised, the FSA regulations have not been amended to reflect the current state of the law. This has created a good deal of confusion for applicants, and sometimes, for local FSA offices. It is particularly important to understand the complexities associated with direct loan eligibility determinations, because adverse determinations can be appealed to the National Appeals Division.[1]

The following chart was designed to organize the analysis of the eligibility requirements for two of the most common types of direct FSA loans, direct farm ownership loans and direct operating loans. There are different criteria for other types of direct FSA loans (such as emergency loans) and there are different criteria for guaranteed loans.

Direct Farm Ownership Loans	**Direct Operating Loans**
United States citizen[2] or legal alien[3]	United States citizen[4] or legal alien[5]
Legal capacity[6]	Legal capacity[7]
Sufficient training or farm experience,[8] with a related requirement that applicant "have operated a farm or ranch for at least 3 years." [9]	Sufficient training or farm experience,[10] interpreted to mean at least "1 year's complete production and marketing cycle within the last 5 years."[11]
The character and industry necessary to carry out the proposed operation[12]	The character and industry necessary to carry out the proposed operation[13]
Honestly endeavor to carry out the applicant's (borrower's) obligations[14]	Honestly endeavor to carry out the applicant's (borrower's) obligations[15]
Be unable to obtain sufficient credit elsewhere at reasonable rates and terms[16]	Be unable to obtain sufficient credit elsewhere at reasonable rates and terms[17]
Be the owner-operator of not larger than a family farm after the loan is closed[18]	Be the owner-operator of not larger than a family farm after the loan is closed[19]
Not be delinquent on any Federal debt[20]	Not be delinquent on any Federal debt[21]
Agree to participate in borrower training[22]	Agree to participate in borrower training[23]

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The chart set forth above lists the basic eligibility requirements for FSA direct farm ownership and operating loans. Last January, the FSA promulgated a new loan processing procedure called, "lo-doc" (for low documentation).[35] Under this new procedure, a farmer requesting an operating loan of $50,000 or less may be

Direct Farm Ownership Loans	Direct Operating Loans
Limitation on Number of Loans: *General Rule* - The applicant must have operated a farm or ranch for at least 3 years[24] AND either 1) be a "beginning farmer or rancher;" 2) have never received a previous direct farm ownership loan; OR 3) have not received a direct farm ownership loan more than ten years before the date the new loan is to be made.[25] Transition Rule - If, on April 4, 1996, the applicant had a direct FO loan outstanding for less than 5 years, the applicant can obtain a new FO loan through April 4, 2006.[26]	Limitation on Number of Loans: *General Rule* - The applicant must be a farmer or rancher who is either 1) a "beginning farmer or rancher;" 2) has not received a previous direct operating loan; OR 3) has received a previous direct operating loan in 6 or fewer years.[27] *Transition Rule* - If, on April 4, 1996, the applicant had received a direct operating loan during each of 4 or more previous years, that applicant can continue to be eligible under this limitation for 3 additional years[28]. The regulations provide that the loans may be in non-consecutive years.[29] SUSPENSION OF RESTRICTION: The Agricultural Risk Protection Act of 2000 suspended this limitation for all direct operating loans from June 20, 2000 through December 31, 2002.[30]
Debt Forgiveness Limitation: Have not caused the agency a loss by receiving debt forgiveness on all or any portion of a direct or guaranteed farmer program loan.[31]	Debt Forgiveness Limitation: *General Rule* - Have not caused the agency a loss by receiving debt forgiveness on all or any portion of a direct or guaranteed farmer program loan[32] *Exception* - A direct farm operating loan *for paying annual farm or ranch operating expenses* may be made to: 1) A borrower who received debt forgiveness as a result of the administrative debt restructuring process under 7 U.S.C. section 2001 OR 2) A borrower who is "current on payments under a confirmed reorganization plan" under chapters 11, 12, o4 13 of the Bankruptcy Code.[33] The FSA regulations have not yet been amended to conform to this bankruptcy exception. The FSA recently announced its interpretation of this exception, and unfortunately, reads the exception extremely narrowly. According to FSA, only borrowers who have not yet received their discharge and who are current on plan payments will be considered eligible. Eligibility will be lost whenever discharge occurs, even if all plan payments are made.[34] This interpretation is arguably inconsistent with Congressional intent. Prior to discharge, there has been no debt forgiveness, so no exception would have been needed.

able to obtain that loan without completing as much documentation as has previously been required. According to the FSA, lo-doc will make the direct operating loan program application process "more consistent with standard industry practices, [making] loan processing... more efficient and less time consuming."[36] It is designed to "decrease the time-frame for family-size farmers to receive their credit, thereby allowing them to conduct their farming operations in a more timely manner."[37] The lo-doc program does not, however, change the basic eligibility criteria for direct operating loans. In order to be eligible for lo-doc processing, the applicant must meet all of the current eligibility requirements for FSA direct OL's listed in section 1941.12, and as described above. In addition, the applicant must be current on all loan payments to FSA and all other creditors, must not have received primary loan servicing or disaster set-aside on any FSA debt within the past 5 years, and must owe FSA less than $100,000, including the new loan. FSA states that these additional requirements are necessary to sufficiently lower the risk from an FSA credit standpoint to make a sound credit decision based on the reduced documentation.[38]

[1] 7 C.F.R. pt. 11.
[2] 7 U.S.C. § 1922(a)(1); 7 C.F.R. § 1943.12(a)(1).
[3] 7 C.F.R. § 1943.12(a)(1).
[4] 7 U.S.C. § 1941(a)(1); 7 C.F.R. § 1941.12(a)(1).
[5] 7 C.F.R. § 1941.12(a)(1).
[6] 7 C.F.R. § 1943.12(a)(1).
[7] 7 C.F.R. § 1941.12(a)(1).
[8] 7 U.S.C. § 1922(a)(2); 7 C.F.R. § 1943.12(a)(3).
[9] 7 C.F.R. § 1943.12(a)(8).
[10] 7 U.S.C. § 1941(a)(2); 7 C.F.R. § 1941.12(a)(3).
[11] 7 C.F.R. § 1941.12(a)(3) (inapplicable to youth loan eligibility).
[12] 7 C.F.R. § 1943.12(a)(4). The regulations provide that a determination of the requisite "character" will emphasize "credit history, past record of debt repayment, and reliability" but that an applicant's "[p]ast record of debt repayment" will not for be cause for ineligibility provided that "an honest attempt" was made to make the payments. *Id.*
[13] 7 C.F.R. § 1941.12(a)(4). The regulations provide that a determination of the requisite "character" will emphasize "credit history, past record of debt repayment, and reliability" but that an applicant's "[p]ast record of debt repayment" will not for be cause for ineligibility provided

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