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An Agricultural Law Research Article

***United States V. National Broiler Marketing  
Association: Will The Chicken Lickin' Stand?***

by

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# UNITED STATES V. NATIONAL BROILER MARKETING ASSOCIATION: WILL THE CHICKEN LICKIN' STAND?

CHARLES GORDON BROWN†

Most of the nation's major broiler<sup>1</sup> producers are skeptical of the wisdom of the old adage "build a better mouse trap and the world will beat a path to your door." The broiler industry built a better mouse trap all right. Sweeping technological and organizational innovations have transformed the industry into one of major agricultural importance. From a meager \$19 million in 1934,<sup>2</sup> gross farm income from broilers soared to \$2.9 billion in 1975,<sup>3</sup> a more than fifteen hundred percent increase in just four decades. The remarkable growth of the industry has been accompanied by an even more remarkable phenomenon: broilers are cheaper today than ever before, despite escalating production costs,<sup>4</sup> because the efficiency of the industry has kept prices low.<sup>5</sup> The broiler industry's mouse trap has been so successful, in fact, that it has become a model for other areas of agricultural production.<sup>6</sup>

But the news is not all good. Among those beating a path to the broiler producers' doors was the Antitrust Division of the United States Department

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From 1975 to 1977, the author was associated with the Atlanta, Georgia, law firm of Alston, Miller & Gaines, attorneys for the National Broiler Marketing Association (NBMA). While so associated, the author performed legal services on behalf of NBMA relating to this antitrust litigation. The author is no longer associated in any way with Alston, Miller & Gaines or NBMA. This article is based solely on facts available to the public generally and does not divulge any information or facts communicated by the client to its attorneys. The opinions expressed herein are solely those of the author.

1. Broilers are young chickens eight to ten weeks old. Their meat is typically more tender than that of older, heavier chickens such as hens. Broilers (also called "fryers" or "young chickens") are raised exclusively for consumption, and are a distinct agricultural product readily differentiated in the market from hens, turkeys, ducks and other types of poultry. F. FABER & R. IRVIN, *THE CHICKEN BROILER INDUSTRY: STRUCTURE, PRACTICES AND COSTS 1* (Economic Research Service, U.S. Dep't of Agriculture, Marketing Research Report No. 930, 1971).

2. V. BENSON & T. WITZIG, *THE CHICKEN BROILER INDUSTRY: STRUCTURE, PRACTICES, AND COSTS 4* table 1 (Economic Research Service, U.S. Dep't of Agriculture, Agricultural Econ. Report No. 381, 1977).

3. *Id.*

4. In 1940, producers received an average of 17.3 cents per pound. In 1934, the price per pound had been 19.3 cents. The price reached a high of 36 cents per pound in 1948, a low of 13.3 cents per pound in 1967. *Id.* The inflation of the 1970's caused production costs to rise significantly. The average price per pound in 1976 was 23.6 cents. *Id.* This represents a price increase of 36% between 1940 and 1976. Wholesale prices for standard domestic commodities over the same period rose an average of almost 350%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1976*, at 432 table 699 (97th ed. 1976) (derived) [hereinafter cited as *ABSTRACT*]; see text accompanying note 106 *infra*.

5. See text accompanying notes 103-06 *infra*.

6. See text accompanying note 145 *infra*.

of Justice. The resulting litigation, styled *United States v. National Broiler Marketing Association*,<sup>7</sup> is now before the United States Supreme Court. The high Court's decision should become a landmark boon or bane for both the agricultural and consuming sectors of the economy. The issues presented by the Chicken Case extend far beyond the broiler industry, and the impact of its final resolution will be felt throughout agriculture.

The Chicken Case marks the first judicial surfacing of a multidimensional controversy that has preoccupied farmers, businessmen, politicians and some legal commentators for years.<sup>8</sup> The central issues are three: (1) Shall off-farm integrators<sup>9</sup> (sometimes called "agribusiness") be allowed to participate and compete in the production, processing and marketing of agricultural commodities; (2) assuming off-farm integrators shall be allowed to participate and compete in agriculture, shall they also be permitted to avail themselves of the antitrust exemption of the Capper-Volstead Act<sup>10</sup> and related statutes; and (3) if the answer to the previous question is affirmative, what standard shall be used, from an antitrust standpoint, to determine *which* off-farm integrators shall be allowed to join or form agricultural cooperatives?<sup>11</sup>

Part I of this article examines the industrial and market pressures experienced by those engaged in agricultural pursuits, with specific emphasis on the trend toward horizontal and vertical coordination among individual production units. The broiler industry, whose reaction to these industrial and market pressures typifies what is happening in other parts of the agricultural sector, is examined in detail as a case history. Based on the material developed in Part I, Part II attempts to answer each of the three

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7. 1975-2 Trade Cas. ¶ 60,509 (N.D. Ga. 1975), *rev'd.*, 550 F.2d 1380 (5th Cir. 1977), *cert. granted*, 98 S. Ct. 260 (1977) (No. 77-117). The government suit has also hatched a number of private treble damage class actions. There are now 23 separate actions consolidated before the United States District Court for the Northern District of Georgia. *In re* Chicken Antitrust Litigation, No. C 74-2454A (N.D. Ga.). Proposals for the settlement of many of these private actions are now before the district court for its approval. None of the proposed classes had been certified as of Oct. 27, 1977 [hereinafter, the National Broiler Marketing Association shall be referred to as "NBMA" and the litigation in which it is involved as the "Chicken Case"].

8. A sampler of the various opinions of representative groups in the public and private sectors may be found in *Hearings on H.R. 11654 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 28 (1972) [hereinafter cited as *Family Farm Act Hearings*].

9. See note 18 *infra*.

10. 7 U.S.C. §§ 291-292 (1970).

11. An agricultural cooperative is a business organization, usually incorporated, owned and controlled by member agricultural producers, which operates for the mutual benefit of its members or stockholders, as producers or patrons, on a cost basis after allowing for the expenses of operation and maintenance and any other authorized deductions for expansion and necessary reserves.

FARMER COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, LEGAL PHASES OF FARMER COOPERATIVES, FCS INFO. 100, at 3 (1976) (footnote omitted).

questions raised above. Because of the immediate relevance of the Chicken Case to these three issues, this article endeavors to resolve them with specific reference to that case, rather than solely as a matter of abstract principle.

## I. VERTICAL INTEGRATION AND HORIZONTAL POWER

### A. *Vertically Integrated Agriculture*

The characteristics and performance of "vertically integrated" agriculture are central to an understanding of the significance of the Chicken Case and how its resolution will affect the agricultural segment of the economy as a whole. The meat, vegetables and other agricultural products purchased by the consumer at his or her local supermarket are the result of a multilevel production process. Generally, these commodities pass through five vertical stages<sup>12</sup> before they reach the consumer's shopping basket: (1) input of raw materials and production resources (feed, seed, growing stock, machinery, equipment and accessories, transportation and energy); (2) commodity production (actual planting, cultivation and harvesting of crops or raising of livestock); (3) production adjuncts (insecticides, medicines, vaccines and other veterinary care, fertilizer and irrigation); (4) handling and processing (transportation and storage, and transformation of commodity to a form usable by consumer); and (5) marketing and distribution (location and selection of buyers, and sale and delivery of commodity at best price). Farmers typically buy their inputs from off-farm sources and sell their outputs to or through off-farm outlets. Their chief function in the chain is limited to commodity production. The other four stages are primarily in the hands of off-farm businesses.<sup>13</sup>

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12. Production stages vary from commodity to commodity and any attempt to generalize the number of stages without due regard to the function of each stage is fruitless. Professor Roy, for example, does not distinguish between input of raw materials and production adjuncts. See E. ROY, *CONTRACT FARMING AND ECONOMIC INTEGRATION* 2 fig. 1-1 (2d ed. 1972). However, for some commodities, the distinction between production inputs and production adjuncts is made. See F. FABER & R. IRVIN, *supra* note 1, at 4, which illustrates the functional relationship between stages of input, production and supply of production adjuncts. For the purposes of this article, the five tier production chain is adopted.

13. This has not always been the case. The yeoman farmer idealized by Thomas Jefferson was totally integrated. Scientific horticulture or husbandry was virtually unknown. The farmer supplied his own seeds and breeding stock, raised his own crops and livestock, and did his own harvesting and slaughtering. He consumed what he required and sold the surplus, usually in local markets. Jefferson might have called him "self-sufficient." The industrial revolution and the vast social, technological and commercial changes brought by it soon had to be reckoned with by the yeoman farmer and disintegrated the bliss of self-sufficiency. On the input side, the farmer became reliant on off-farm sources for equipment, seeds, feeds and breeder stock. On the output side, the farmer became dependent on off-farm processors, transporters and marketers. See generally E. ROY, *supra* note 12, at 1, 18, 279-80.

An "integrator" assembles two or more of the five stages described above under his own control.<sup>14</sup> This assembly is called "integration" or "vertical integration."<sup>15</sup> The farmer who sets up his own processing facility or does his own marketing is an integrator.<sup>16</sup> Groups of farmers can also integrate by joining or forming cooperative associations organized for the purposes of acquiring production inputs and production adjuncts, or for collectively handling, processing or marketing their output.<sup>17</sup> Off-farm<sup>18</sup> businesses such as feed mills, hatcheries and processors can also be integrators.<sup>19</sup>

Integration may come about through internal expansion, through outside acquisition or by contract.<sup>20</sup> If, for example, a group of sugar beet producers forms a cooperative and builds a beet sugar processing plant,<sup>21</sup> vertical integration is achieved through internal growth. If a potato grower cooperative purchases the plant and equipment of a potato processor,<sup>22</sup> vertical integration occurs by acquisition. If the sugar beet producers and potato growers lack or are unwilling to risk the financial resources necessary to build or acquire processing facilities, they can enter into growing contracts with various commercial processors for the sale of specified quantities of beets or potatoes at agreed upon prices.<sup>23</sup> This last example illustrates a form of integration by contract.<sup>24</sup> Of the three means of achieving vertical integration, integration by contract is the most prevalent.<sup>25</sup>

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14. *Id.* at 3, 18.

15. *Id.* at 3.

16. *Id.* at 5.

17. *Id.* at 6, 20, 524-40.

18. Throughout this article, the term "off-farm" integrator or "off-farm" firm shall be used to designate businesses that began in the nonfarm (nonproduction) sector. Because of their integration, forward or backward, into the production stage, however, these enterprises have most certainly become involved in the production of commodities. Thus, the term "off-farm" is used only to differentiate farming enterprises by their origins. It should not be construed as an indication that the "off-farm" firm is not engaged in farming. The term "on-farm" shall designate farm-based producers.

19. See E. ROY, *supra* note 12, at 6.

20. *Id.* at 5-6, 19.

21. *E.g.*, *Beet Growers to Build \$55.8 Million Plant*, 40 NEWS FOR FARMER COOPERATIVES, Mar. 1974, at 7.

22. *E.g.*, *Mobley, Potato Growers Form Processor Co-op to Reactivate Plant*, 43 FARMER COOPERATIVES, Nov. 1976, at 15.

23. E. ROY, *supra* note 12, at 5-6. For an example in grain marketing, see Thurston, *Grain Marketing Agreements Provide Different Approach*, 43 FARMER COOPERATIVES, Dec. 1976, at 4.

24. Integration by contract assumes a variety of forms and achieves varying degrees of integration. Professor Roy analyzed integrated relationships in specified commodities and found six different forms in use in hatching egg production, thirteen in broiler production, eleven in turkey production, eight in table egg production, eleven in market hog production and five in beef cattle production. E. ROY, *supra* note 12, at 93-100, 118-32, 157-65, 185-94, 236-42, 285-93. The contract relationship may be developed between enterprises in any two stages of the production chain.

25. *Id.* at 3.

The objective of vertical integration is closer coordination between the otherwise independent and often disjointed stages in the food production chain.<sup>26</sup> Numerous advantages are associated with this coordination.<sup>27</sup> Production and marketing costs per unit of output are reduced, and production and marketing technologies, as well as the quality of the product, are improved. Production and market risks at any one stage can be minimized by using profits from one stage to subsidize losses at another, thus enhancing the overall stability and viability of the enterprise. By eliminating middlemen and multiple ownership stages, the cost of delivered products is less, especially when the middlemen have themselves been inefficient or exploitative. Vertical integration also protects against shortages of supply through closer coordination between output and market demand.<sup>28</sup>

The defendants in the Chicken Case are predominantly off-farm integrators who, through contract growing arrangements, produce approximately fifty percent of all the broilers consumed in the United States.<sup>29</sup> The government's suit does not, however, challenge defendants' *vertical* activities. Rather, the antitrust objection is to defendants' *horizontal* association as members of NBMA.<sup>30</sup> There is, however, an important relationship between vertical integration and horizontal power.

### B. *The Necessity of Horizontal Power and Coordination*

Vertical integration has compiled an enviable track record for many commodities. The efficient coordination of the vertical stages of production, however, avail the producer little if his product is perishable, his production decisions are unenlightened in view of market indicators, and oligopsony confronts him in the marketplace. The average producer cannot live on vertical integration alone—he must have horizontal power. The historic cooperative and marketing legislation enacted by Congress during this century has recognized this principle.

Section 6 of the Clayton Act,<sup>31</sup> the Capper-Volstead Act,<sup>32</sup> the

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26. See *Family Farm Act Hearings*, *supra* note 8, at 21 (testimony of J. Phil Campbell, Under Secretary of Agriculture).

27. Of course, vertical integration can entail disadvantages. Some of them, listed by Professor Roy, include inflexibility of operation, management complexity, increased overhead cost, lack of alternative opportunities for invested capital, incompatible stages of operation, creation of less competitive markets and the obscuring of inefficient stages in the vertical system. E. ROY, *supra* note 12, at 18.

28. *Id.*

29. Amended Government Complaint ¶ 7 (copy on file in office of *North Carolina Law Review*).

30. NBMA was accused of combining and conspiring "to fix, maintain and stabilize" the price of broilers in restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1970) & Supp. V 1975. Amended Government Complaint ¶ 8.

31. 15 U.S.C. § 17 (1970).

32. 7 *id.* §§ 291-292.

Cooperative Marketing Act of 1926<sup>33</sup> and the Agricultural Marketing Acts of 1929<sup>34</sup> and 1946<sup>35</sup> were designed to foster both market *power* and market *coordination*. Congress decided to give the producer a sufficient degree of market power to alleviate the disparity in bargaining positions between producers and off-farm suppliers, processors and other "middlemen."<sup>36</sup> Congress also wanted to allow the producer to gain sufficient power, through horizontal affiliation with other producers, to integrate vertically and compete directly with "middlemen" in bringing commodities to the consumer at the lowest possible prices.<sup>37</sup> The lawmakers also envisioned a certain degree of vertical and horizontal coordination, especially with regard to the origination and dissemination of market information and the marketing of agricultural products.<sup>38</sup> A principal goal was the closer coordination of the various stages of the food chain to avoid disastrous cycles of gluts and shortages.<sup>39</sup>

The state of American agriculture during the first two decades of this century was precarious. Based on farm size and numbers,<sup>40</sup> farming epitomized the economist's competitive model. The markets to which these farms sold their output, however, were not so competitive. Dominated by large processing trusts and institutional middlemen,<sup>41</sup> farmers parted with their crops and livestock for what they were offered, not what they asked.<sup>42</sup> Furthermore, the individual farmer had no way to gauge demand because his markets were distant and impersonal.<sup>43</sup> Congress's solution was to permit

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33. *Id.* §§ 451-457.

34. 12 *id.* §§ 1141b-1141j.

35. 7 *id.* §§ 1621-1629 (1970 & Supp. V 1975).

36. See text accompanying note 223 *infra*.

37. See notes 228-29 and accompanying text *infra*.

38. See note 226 and accompanying text *infra*.

39. See note 227 and accompanying text *infra*.

40. Of 6,448,343 farms in 1920, 59% had less than 100 acres; 81% had less than 175 acres. ABSTRACT, *supra* note 4, at 647 table 587 (53d ed. 1931).

41. The Federal Trade Commission was aware of the manipulation of markets to the disadvantage of farmers. An investigation was commenced of the "Harvester" and "Packer" trusts and the Corn Products Refining Monopoly. President Wilson included reform of marketing channels in his New Freedom program, and Congress obliged by passing the United States Cotton Futures Act of 1914, ch. 255, 38 Stat. 693, United States Grain Standards Act, ch. 313, 39 Stat. 482 (1916), and the United States Warehouse Act, ch. 313, 39 Stat. 486 (1916). J. SHIDELER, *FARM CRISIS 1919-1923*, at 8 (1957). See also Campbell, *Cooperatives: A Necessary Family Farm Marketing Tool*, 41 NEWS FOR FARMER COOPERATIVES, Aug. 1974, at 14 (brief history of the market problems that gave rise to the cooperative movement).

42. Congress was aware of the disadvantageous bargaining position of the farmer. The House report on the proposed Capper-Volstead bill surmised: "Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price." H.R. REP. NO. 24, 67th Cong., 1st Sess. 2 (1921). See also 62 CONG. REC. 2262 (remarks of Senator Hitchcock), 2058 (1922) (remarks of Senator Capper).

43. See 62 CONG. REC. 2058 (1922) (remarks of Senator Capper). The dislocations caused by lack of coordination between production, marketing and demand prompted one senator to

the nation's farmers to band together horizontally and to operate vertically for the purposes of self-help.

As enacted in 1914, section 6 of the Clayton Act<sup>44</sup> removed the Sherman Act's<sup>45</sup> prohibition against horizontal combinations in restraint of trade for certain "agricultural organizations."<sup>46</sup> This legislation was followed some eight years, one world war and a severe agricultural depression<sup>47</sup> later by the Capper-Volstead Act.<sup>48</sup> In positive terms,<sup>49</sup> Capper-Volstead sanctioned the right of agricultural producers<sup>50</sup> to "act together in associations"<sup>51</sup> for the purposes of acquiring and exercising market power.<sup>52</sup> In addition to its provision for horizontal power, Capper-Volstead authorized associations of producers to engage in certain vertical activities

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query: "How many times have you seen, in days past, the apple crop in New England rotting on the ground and apples at a high price in the City of New York?" *Id.* at 2052 (remarks of Senator Kellogg). See also 60 *id.* at 373 (1920) (remarks of Senator Walsh).

44. 15 U.S.C. § 17 (1970).

45. *Id.* §§ 1-7 (1970 & Supp. V 1975).

46. Section 6 of the Clayton Act reads, in pertinent part:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

*Id.* § 17 (1970).

47. With the end of World War I, agriculture slipped into an acute depression. A price panic in 1920-21 dropped the prices of the ten leading crops by two-thirds in twelve months. J. SHIDELER, *supra* note 41, at 46, 79-80.

48. 7 U.S.C. §§ 291-292 (1970).

49. Section 6 of the Clayton Act carved out an exception to the Sherman Act. It did not provide that individual farmers could organize themselves. It merely stated that "agricultural organizations" would not be held to be illegal combinations and conspiracies. 15 *id.* § 17. The efficacy of the agricultural organizations authorized by § 6 was further weakened by the prohibition against capital stock and for-profit operation. *Id.* The Capper-Volstead Act cast the § 6 exemption in positive terms and removed any doubt, within limits, about the antitrust immunity of cooperatives. It also authorized cooperatives to issue capital stock. 7 *id.* § 291.

50. The Act authorizes cooperative activities for "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." 7 *id.* § 291. Unless the producer is a farmer (or other approved entity), he may not partake of the benefits of cooperation. The central issue in the Chicken Case is whether NBMA's integrator-members are "farmers" within the meaning of the Act.

51. *Id.*

52. Although the purpose of the Act is to allow agricultural producers to acquire some degree of market power, § 2 of the Act, *id.* § 292 (1970), authorizes the Secretary of Agriculture to order agricultural associations to cease and desist from monopolizing or restraining trade in interstate commerce if the effect of cooperation is to "unduly enhance" the price of any agricultural products. The effectiveness of § 2 of the Capper-Volstead Act is highly suspect. See Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemption for Agricultural Cooperatives*, 61 VA. L. REV. 341, 379 (1975). See also U.S. DEP'T OF JUSTICE, REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES 12 (1977); *Price Enhancement: A Progress Report*, 43 FARMER COOPERATIVES, Mar. 1977, at 22, 23; *Undue Price Enhancement—A Myth?*, *id.* at 10; Statement of Donald I. Baker, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, before the House Subcomm. on Monopoly and Commercial Law of the Comm. on the Judiciary 18 (Mar. 29, 1977) (copy on file in office of *North Carolina Law Review*).



such as processing, preparing for market, handling and marketing.<sup>53</sup>

Subsequent to the enactment of Capper-Volstead, Congress crafted three more pieces of legislation to foster horizontal and vertical coordination in the marketplace. The Cooperative Marketing Act of 1926 authorized cooperative associations to "acquire, exchange, interpret and disseminate" present or prospective market, statistical and economic data to their members or to other associations.<sup>54</sup> The 1926 Act also established the forerunner of the Farmers Cooperative Service<sup>55</sup> and vested it with statutory responsibility for conducting economic research and market analysis and for providing organizational, operational, financial and merchandizing advice and other services.<sup>56</sup> Among the catalogued vertical activities specifically referred to in the 1926 Act are warehousing, manufacturing, storage, cooperative purchasing of farm supplies, credit, financing, insurance and "other cooperative activities."<sup>57</sup>

The 1926 Act was followed by the Agricultural Marketing Acts of 1929<sup>58</sup> and 1946.<sup>59</sup> The 1929 Act focused on the problem of market instability and sought to curb speculation, to make commodity distribution more efficient and to encourage cooperative marketing.<sup>60</sup> The 1946 Act, like its predecessor, promoted the development of orderly markets and efficient distribution.<sup>61</sup> In particular, the 1946 Act sought to streamline distribution by improving procurement, storage, processing, handling, inspection and transportation systems.<sup>62</sup>

It is significant that Congress implicitly recognized that agriculture's salvation depended upon its horizontal and vertical development.<sup>63</sup> Without

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53. 7 U.S.C. § 291 (1970) provides, in pertinent part, that [p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing . . . such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes

54. *Id.* § 455.

55. The Farmer Cooperative Service's predecessor was called the Division of Cooperative Marketing. Cooperative Marketing Act of 1926, ch. 725, § 2, 44 Stat. 802 (1927). A concise history of the development and shifting responsibilities of the FCS is collected in 43 FARMER COOPERATIVES, July 1976, at 3-23.

56. 7 U.S.C. § 453(b)(1) to (7) (1970).

57. *Id.* § 453(a).

58. 12 *id.* §§ 1141b-1141j.

59. 7 *id.* §§ 1621-1629 (1970 & Supp. V 1975).

60. 12 *id.* § 1141(a)(1) to (4) (1970).

61. 7 *id.* § 1622(d), (e), (g), (k).

62. *Id.* § 1622(a)-(c), (h)-(j), (l)-(n).

63. A. W. Mellon, while Secretary of the Treasury, succinctly underscored the relationship between horizontal and vertical activities when he testified on the proposed Cooperative Marketing Act of 1926:

vertical coordination, market dislocations and inefficiencies would continue despite horizontal power.<sup>64</sup> Without horizontal power and coordination, even the most efficient synchronization of production stages would not offset the adverse effects of uninformed decisionmaking and unequal bargaining power.<sup>65</sup> Against these two dimensions—horizontal and vertical—of modern agriculture, the future role of off-farm integrators must be appraised. NBMA and the broiler industry provide a good case study.

### C. Vertical and Horizontal Performance in the Broiler Industry

Vertical integration now accounts for a significant portion of domestic agricultural production. In 1970, thirty-one percent of all livestock products and ten percent of all crops were produced under contract with off-farm integrators or cooperatives.<sup>66</sup> Another five percent of livestock and crop production occurred under other forms of vertical integration.<sup>67</sup> Broilers are produced almost exclusively through integrated systems.<sup>68</sup>

#### 1. History and Present Day Structure

That white-frocked Kentucky colonel is fortunate not to have been born fifty years ago. Had he been, he would have been lickin' beef, pork or mutton off his fingers instead of chicken. Fifty years ago there were no 'broilers'<sup>69</sup> and there was no broiler industry.<sup>70</sup> Commercially produced

A way out of the difficulties lies in the elimination of waste between the producer and the consumer, so that the farmer may receive a higher net price and yet the ultimate consumer may not have to pay more. This purpose can be approached through more orderly marketing and cooperation.

67 CONG. REC. 11266-67 (1926) (emphasis supplied).

64. Wherever extortion in farm products has been practiced it has been done after the farmer parted with his products. It seems to me to be absolutely necessary, if we are to consider the economic good of the country, that this increase of cost should be avoided if possible, to the end that the producer and the consumer both might benefit. If by allowing cooperative understandings [horizontal] we can shorten the distance between producer and consumer and eliminate the toll gates on the way [vertical] the farmer and the consumer will both be benefitted.

62 *id.* at 2216 (1922) (remarks of Senator Townsend).

65. "The main object of the cooperative association is to get reasonable prices for the farmer . . ." *Id.* at 2049 (remarks of Senator Kellogg).

66. *Family Farm Act Hearings*, *supra* note 8, at 21-22.

67. *Id.* at 22-23. For certain commodities, the percentage of total output produced under some form of vertical integration was relatively high; among these were wholesale milk (98%), turkeys (54%), eggs (40%), cattle (35%), sugar beets and sugar cane (100%), tomatoes, sweet corn and green beans (95%), citrus fruits (85%) and potatoes (70%). *Id.* at 25-28.

68. 97% in 1970. *Id.* at 28. In 1977, 91% of all broilers are produced under contract. Another 8% are produced by integrators directly. Independent production accounts for less than 1%. V. BENSON & T. WITZIG, *supra* note 2, at 11.

69. The broiler of today is a different commodity from that of the 1920's. Before the development of modern broiler production, "broilers" consisted of "rather tough-meated hens culled from laying flocks, and the male half of the replacement hatch, the latter killed off at from 15 to 30 weeks of age." B. TOBIN & H. ARTHUR, *DYNAMICS OF ADJUSTMENT IN THE*

chicken was almost exclusively the seasonal by-product of the annual springtime hatch of laying hens.<sup>71</sup> The eating chicken of that era, the "June Fryer," was popular, but its output was so limited and so seasonal that regular markets and mass consumption had never developed.<sup>72</sup>

The economic history of the broiler industry recounts the discovery of and the effective response to consumer demand for a good eating chicken.<sup>73</sup> As supermarket retailing<sup>74</sup> and restauranting<sup>75</sup> developed during the 1920's and 1930's, egg producers began to realize the potential year-round market for their springtime by-products.<sup>76</sup> Year-round production was initiated, enjoyed success and expanded.<sup>77</sup> Between 1934 and 1940 broiler output quadrupled.<sup>78</sup> World War II further accelerated the industry's already rapid development.<sup>79</sup> In response to wartime demand, industry output more than doubled between 1940 and 1945.<sup>80</sup> During the post-war years, substantial advances in production technology upgraded the quality of the meat<sup>81</sup> and streamlined the production process.<sup>82</sup> With financial help from feed manufacturers and dealers,<sup>83</sup> broiler growers enlarged their operations to take

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BROILER INDUSTRY 13-14 (1964). The hens' meat was dry and strongly flavored and the meat of the cockerels was usually tough. *Id.* at 14. The modern broiler is readily distinguished from his ancestor by taste, texture and size. It is an altogether different product.

70. *Id.* at 8. Chicken had always been eaten, of course, but the commercial broiler industry as it is known today was nonexistent before the 1930's. Most chicken was consumed by farmers from their barnyard flocks. Commerce in "live market" broilers was confined to the spring and early summer months. Only frozen birds were available on a year round basis. Fresh, ice packed (non-frozen) broilers were not marketed commercially. *Id.* at 8-9.

71. W. TERMOHLEN, J. KINGHORNE, E. WARREN & J. RADABAUGH, AN ECONOMIC SURVEY OF THE COMMERCIAL BROILER INDUSTRY 8-9 (1936) [hereinafter cited as ECONOMIC SURVEY]. Barnyard flocks also produced surpluses that were marketed locally. *Id.* at 8. See also B. TOBIN & H. ARTHUR, *supra* note 69, at 8.

72. B. TOBIN & H. ARTHUR, *supra* note 69, at 8-9.

73. *Id.* at 8-9, 15. Tobin and Arthur comment that "once broiler growing got started, it not only discovered a waiting market but also created a new market that far outdistanced anyone's estimate of preexisting latent demand." *Id.* at 15.

74. See *id.* at 26-27.

75. See ECONOMIC SURVEY, *supra* note 71, at 7-10.

76. B. TOBIN & H. ARTHUR, *supra* note 69, at 8.

77. *Id.* at 8, 15-16. Commercial broilers accounted for only three percent of the total number of chickens raised in 1934-35.

78. V. BENSON & T. WITZIG, *supra* note 2, at 4 table 1. Production increased from 97 million pounds in 1934 to 413 million pounds in 1940, a 426% increase in only 6 years.

79. PACKERS AND STOCKYARD ADMINISTRATION, U.S. DEP'T OF AGRICULTURE, P.&S.A. NO. 1, THE BROILER INDUSTRY: AN ECONOMIC STUDY OF STRUCTURE, PRACTICES AND PROBLEMS 1 (1967) [hereinafter cited as ECONOMIC STUDY]. See also B. TOBIN & H. ARTHUR, *supra* note 69, at 15-17.

80. V. BENSON & T. WITZIG, *supra* note 2, at 4 table 1. Production jumped from 413 million pounds in 1940 to 1.1 billion pounds in 1945, a 268% increase.

81. B. TOBIN & H. ARTHUR, *supra* note 69, at 17, 31-35.

82. ECONOMIC STUDY, *supra* note 79, at 1; B. TOBIN & H. ARTHUR, *supra* note 69, at 18-20.

83. The phenomenal growth of broiler production was largely stimulated by the credit extended by large feed manufacturers and dealers to broiler growers and contractors. Equity

advantage of economies of scale. The onset of mass domestic retailing by supermarket chains boosted domestic consumption<sup>84</sup> and substantial export markets developed.<sup>85</sup> By 1954, the average American consumed approximately thirteen and one-half pounds of broiler chicken per year. In 1934, he had consumed only eight ounces.<sup>86</sup>

During the 1930's and 1940's the various stages of broiler production, primary breeding, hatching, feed milling, growing, processing and marketing, were usually performed by separate enterprises.<sup>87</sup> The primary breeder delivered hatching eggs to the hatchery. The hatchery produced broiler chicks that were then sold to growers. Growers purchased feed from feed manufacturers and raised the broiler chicks to maturity. Processors then bought the grown-out broilers. After being slaughtered and dressed, the ready-to-cook bird was marketed.<sup>88</sup> Each stage was its own profit center.<sup>89</sup>

The growth of consumer demand for broiler meat in the 1940's and the financial risks associated with expansion signaled the end of the relative independence of these production units. As broiler prices sagged and declined, growth of any kind was threatened by a lack of enterprise capital.<sup>90</sup> Growers either lacked the financial resources to expand production themselves or were unwilling to risk these resources in the market.<sup>91</sup> Post-war initiatives in broiler production and marketing came from feed manufacturers and processors who appreciated the potential of the broiler industry and who had the capital to make it work.<sup>92</sup> Unconventional financing provided by feed manufacturers, processors and other integrators allowed growers to expand the size and productivity of their operations without taking the risks usually associated with expansion.<sup>93</sup> Credit, however, had its price. "Growing contracts" evolved that divested the grower of much of his indepen-

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capital was not available to most growers, nor did they have ready access to capital markets. Even if they had access, they often proved unwilling to assume the heavy price risks of borrowing. The feed mills and dealers, however, took the gamble and contributed the financial resources that eventually put broiler production on a "technologically advantageous scale." ECONOMIC STUDY, *supra* note 79, at 1; B. TOBIN & H. ARTHUR, *supra* note 69, at 20-24.

84. B. TOBIN & H. ARTHUR, *supra* note 69, at 26-29.

85. *Id.* at 29-30.

86. V. BENSON & T. WITZIG, *supra* note 2, at 4 table 1. By 1976, annual per capita consumption had risen to 40.4 pounds. *Id.*

87. ECONOMIC STUDY, *supra* note 79, at 1; E. ROY, *supra* note 12, at 116; B. TOBIN & H. ARTHUR, *supra* note 69, at 35, 54.

88. ECONOMIC SURVEY, *supra* note 71, at 3-5.

89. See B. TOBIN & H. ARTHUR, *supra* note 69, at 35.

90. The use of credit in broiler production was not new. Production costs have always been fairly leveraged. ECONOMIC SURVEY, *supra* note 71, at 4. Falling prices, however, caused the grower to seek alternative means of financing. E. ROY, *supra* note 12, at 118.

91. B. TOBIN & H. ARTHUR, *supra* note 69, at 21, 23.

92. ECONOMIC STUDY, *supra* note 79, at 1.

93. *Id.*; B. TOBIN & H. ARTHUR, *supra* note 69, at 20-24.

dence and managerial discretion. The use of growing contracts spread in the late 1940's and the 1950's, and broiler growers accepted them as a means of minimizing or sharing production and market risks.<sup>94</sup> By the mid-1970's, ninety-nine percent of all commercial broilers produced domestically were raised under grower contracts or by integrated firms themselves.<sup>95</sup> The typical production operation became a single profit center,<sup>96</sup> with the broiler integrator involved in all five of the formerly separate stages of production.<sup>97</sup> In the 1930's and 1940's, growers assumed the risks associated with the input, commodity production and production adjuncts stages. They had to purchase chicks, grow them and supply feed, medicine and vaccines.<sup>98</sup> Today, the integrator assumes these risks. A breakdown of the cost of producing a flock of broilers substantiates the risk borne by the integrator and the shrinking dominion of the grower. Around ninety percent of the cost is shouldered directly by the integrator.<sup>99</sup> The remaining ten percent represents the grower's payment, all or most of which is, in most cases, guaranteed.<sup>100</sup>

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94. ECONOMIC SURVEY, *supra* note 71, at 1, 10-11, 22, 39-44.

95. See V. BENSON & T. WITZIG, *supra* note 2, at 11.

96. ECONOMIC STUDY, *supra* note 79, at 1.

97. V. BENSON & T. WITZIG, *supra* note 2, at 1-2; ECONOMIC STUDY, *supra* note 79, at 6, 7 fig. 2, 22; *Bargaining at Work, Labor Problems, Commodity Marketing Experiences*, 44 FARMER COOPERATIVES, May 1977, at 12.

The 5 stages of production include: (1) Input of raw material and production resources (The typical broiler integrator supplies all chicks, having made all decisions as to the number and timing of hatchery egg placements and the breed or type of broiler to be produced); (2) commodity production (A portion of the actual raising of broiler chicks to maturity is contracted out to broiler growers. The growers house and care for the birds as they grow to marketable size, providing broiler houses, heaters, feeders, waterers, heating fuel, electricity and labor. The integrator, however, supervises the growers' activities, either indirectly by contract or directly through field supervisors); (3) production adjuncts (The integrator supplies broiler feed and makes decisions concerning diet and type of feed. The integrator also provides medicines, vaccines, health supplies and veterinary services); (4) handling and processing (The integrator determines the age and size at which the birds are to be marketed. With the growers' help, the integrator catches, coops, loads and transports the live broilers to his processing plant for slaughter, dressing and grading); and (5) marketing and distribution (The dressed birds are marketed according to age, weight and type to a variety of customers, including retail chain stores, fast food outlets, institutional consumers, wholesalers and further processors. Some integrators do their own shipping although most contract it out).

98. See text accompanying notes 87-89 *supra*.

99. See V. BENSON & T. WITZIG, *supra* note 2, at 8; E. ROY, *supra* note 12, at 138 table 4-1. See also Letter from George B. Rogers, Program Leader, Poultry, Economic Research Service, U.S. Dep't of Agriculture, to Charles S. Stark, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice 4 (May 9, 1975) (copy on file in office of *North Carolina Law Review*), reprinted in Joint Appendix for Appellant and Appellee filed with Fifth Circuit 474 [hereinafter cited as Rogers].

100. See ECONOMIC STUDY, *supra* note 79, at 10-11.

## 2. Vertical Performance

The positive effects on production of vertical integration have been impressive: output climbed to 12.5 billion pounds in 1976,<sup>101</sup> and gross farm income from broiler production was over \$2.9 billion.<sup>102</sup> The greatest success of vertical integration, however, has been its achievements in efficiency.<sup>103</sup> Efficiency of production has kept prices low despite increasing feed<sup>104</sup> and energy<sup>105</sup> costs. Adjusted for inflation, broiler prices are much lower today than they were in 1934.<sup>106</sup>

The farm-retail spread, often called the marketing margin or marketing charge,<sup>107</sup> is the difference between the retail price and the farm value of a commodity.<sup>108</sup> Vertical integration should, if truly more efficient, hold down the spread between retail price and farm value because of cost efficiency in the delivered product and the elimination of middlemen.<sup>109</sup> The spread between the farm value and retail price of broilers was 20.6 cents in 1953.<sup>110</sup> By 1975, the marketing margin had widened to 28.6 cents,<sup>111</sup> but this represented only a 39% increase in the spread over the 22 year period. This is remarkable compared to the aggregate widening of the margin experienced by agriculture as a whole, which amounted to 107% over the same period.<sup>112</sup>

The relative amounts and costs of production inputs and adjuncts is another means of gauging the broiler industry's production efficiency. The

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101. V. BENSON & T. WITZIG, *supra* note 2, at 4 table 1.

102. *Id.*

103. See F. FABER & R. IRVIN, *supra* note 1, at 8.

104. W. CATHCART & G. RECTOR, POULTRY AND EGG SITUATION 22 table 18 (Economic Research Service, U.S. Dep't of Agriculture, PES-293, Mar. 1977); *id.* at 21 table 14 (PES-287, Sept. 1975). See also ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, POULTRY AND EGG STATISTICS, SUPPLEMENT FOR 1972-75 TO STATISTICAL BULLETIN No. 525, at 32-33 tables 58-60 [hereinafter cited as STATISTICS (SUPP.)].

105. ABSTRACT, *supra* note 4, at 449 table 724, 596 table 994.

106. See ECONOMIC STUDY, *supra* note 79, at 15, 23. See also note 4 *supra*.

107. F. SCOTT & H. BADGER, FARM-RETAIL SPREADS FOR FOOD PRODUCTS 7 (Economic Research Service, U.S. Dep't of Agriculture, Misc. Pub. No. 741, 1972).

108. *Id.*

109. It is nonetheless difficult to gauge the beneficial impact of vertical integration on the delivered price. The spread may actually increase despite exceptional efficiencies in the production area because the determination of the retail price is out of the producer's hands. The retailer is the decisionmaker. Generally, however, cost efficiency attributable to vertical integration should make the retail spread smaller for the commodity produced through vertical integration than for commodities not produced through vertical integration.

110. F. SCOTT & H. BADGER, *supra* note 107, at 54.

111. W. CATHCART & G. RECTOR, *supra* note 104, at 26 table 22.

112. ABSTRACT, *supra* note 4, at 650 table 1100; F. SCOTT & H. BADGER, *supra* note 107, at 3 table 1. See also F. FABER & R. IRVIN, *supra* note 1, at 31-33 fig. 5 & table 16. The superior performance of the broiler industry has been attributed to "economies of scale, automation and other gains in marketing efficiencies." F. SCOTT & H. BADGER, *supra* at 54. See also E. ROY, *supra* note 12, at 112-15.

most expensive components of a broiler production system are feed, broiler chicks and labor. Together, these elements comprise almost ninety-four percent of the total cost of producing a broiler.<sup>113</sup> Vertical integration has optimized the per unit cost of each of these inputs. Improved feed formulations have reduced the amount of feed required to produce one pound of live broiler from 4 pounds in 1940 to 2.1 pounds today.<sup>114</sup> Integrators have cut back chick costs by improving their survival rate.<sup>115</sup> The labor component has also been drastically reduced. In 1940, it took 250 man-hours to produce 1,000 broilers.<sup>116</sup> In 1969, the same amount of broilers could be produced by only 15 man-hours.<sup>117</sup> The overall productivity of the poultry industry, of which broilers comprise a substantial part,<sup>118</sup> increased almost 1200% between 1940 and 1969.<sup>119</sup> For agriculture as a whole, it was only 700%.<sup>120</sup>

Vertical integration has served the broiler industry well. The coordination of the various stages of production has produced a technologically advanced and cost efficient system.<sup>121</sup> Performance, however, must also be measured in horizontal terms.

### 3. Horizontal Performance

The vertical achievements of the broiler industry have not prevented it from suffering from chronic price instability. The weak links in the industry's vertical chain have always been over-production<sup>122</sup> and marketing.<sup>123</sup>

113. F. FABER & R. IRVIN, *supra* note 1, at 8. See also E. ROY, *supra* note 12, at 138 table 4-1. Roy estimates that these three components make up 88% of the cost of production.

114. V. BENSON & T. WITZIG, *supra* note 2, at 7-8.

115. In 1949, the chick mortality rate was around 10-20% of the flock. *Id.* at 8. By 1972-74, this mortality rate had been dropped to an average of 4.27% for broiler operations in the southern and northeastern regions. Rogers, *supra* note 99, at 4, reprinted in Joint Appendix at 474 (derived). For southern operations alone, the rate was even lower: 3.26%. *Id.*

116. F. FABER & R. IRVIN, *supra* note 1, at 8.

117. *Id.* This means that it took only 6% as much labor in 1969 to produce the same quantity of broilers as in 1940. This far surpasses the national average of 30% as much labor in 1969 to produce the same results as in 1940. ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, STAT. BULL. NO. 561, CHANGES IN FARM PRODUCTION AND EFFICIENCY 31 table 32 (1976) [hereinafter cited as CHANGES IN FARM PRODUCTION AND EFFICIENCY].

118. Seventy-six percent of all major poultry (including broilers, non-broiler chicken and turkeys, but excluding eggs), measured by gross farm income, STATISTICS (SUPP.), *supra* note 104, at 11 table 19, and 76.5% of all major poultry, measured by pounds produced, *id.* table 16-18 (derived), were represented by broilers in 1975.

119. CHANGES IN FARM PRODUCTION AND EFFICIENCY, *supra* note 117, at 44 table 45.

120. *Id.* The efficiency achieved in production inputs and adjuncts has been extended to efficiencies in handling, processing and marketing as well. F. FABER & R. IRVIN, *supra* note 1, at 19.

121. V. BENSON & T. WITZIG, *supra* note 2, at 1; ECONOMIC STUDY, *supra* note 79, at 15, 23; E. ROY, *supra* note 12 at 112-15.

122. B. TOBIN & H. ARTHUR, *supra* note 69, at 55-58.

123. "There can be little doubt that price instability is excessive in the broiler business. . . . [T]he market may put a solvent and efficient [producer] in jeopardy." *Id.* at 91.

To a large degree, these problems have resulted from the broiler industry's failure to develop horizontally.<sup>124</sup>

The industry has had a history of violent price swings,<sup>125</sup> years of losses<sup>126</sup> and years of only marginal profitability.<sup>127</sup> This instability is attributable to the production process, to the nature of the product itself and to the structure of the market into which the product is sold. Broiler production is typical of agricultural production generally in that production decisions are made far in advance. The production cycle is continuous and takes a minimum of 280 days to complete.<sup>128</sup> The market existing at the time the production decision is made or the time the production adjustments are ordered may change significantly by the time the broilers are ready for market.<sup>129</sup> Once the production commitments are made, they cannot be reversed without the loss of investment.

The market itself is highly unpredictable. Because of its sensitivity to such mutually independent stimuli as weather,<sup>130</sup> retail activity,<sup>131</sup> the sup-

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124. It is . . . unfortunate that this spectacular [efficiency] achievement within the broiler chicken industry did not result in better profits for a longer period of time than it did. Technology and growth came so fast and so thoroughly that they gave impetus to expansion, without, at the same time, giving any one grower or contractor any degree of control over the market.

E. ROY, *supra* note 12, at 112.

125. B. TOBIN & H. ARTHUR, *supra* note 69, at 91.

126. For example, net losses were suffered in 1970, 1971 and 1974. V. BENSON & T. WITZIG, *supra* note 2, at 7 table 4.

127. 1972 was a breakeven year. 1968 and 1976 exhibited only marginal profitability. *Id.* See also ECONOMIC STUDY, *supra* note 79, at 16 table 12.

128. B. TOBIN & H. ARTHUR, *supra* note 69, at 48. It takes a minimum of 280 days to produce one broiler, beginning with the decision to place primary setting eggs for the hatching of the chicks that will become the hatchery supply flock. Once the hatching egg is produced, it can be incubated and the broiler chick hatched, graded, debeaked and vaccinated in 24 days. It takes approximately 60 days to grow a broiler. A dressed broiler is thus the product of approximately 280 days' worth of planning. Since a typical laying period for the hatchery supply flock is 245 days, the length of the entire cycle runs 525 days.

129. Tobin and Arthur downgrade the forward planning risk of broiler production. They compare the production cycles of beef (27-30 months) and pork (10 months) and conclude that "[t]here has been a tendency perhaps to focus too intently on the production cycles in the broiler industry in the sense that the period of time, in and of itself, presented a peculiar difficulty." *Id.* at 47-48. The relationship between forward planning and time is accentuated in broiler production because of the perishability of the crop. Inventories of live broilers cannot be accumulated for substantial periods of time. Not only do feed costs rise the longer the broilers are fed, the heavier the birds become the less valuable they are. Broilers command premium prices for relatively narrow weight ranges. Furthermore, the limited shelf-life of the broiler after slaughter (7 days) puts pressure on the producer to market his birds. He cannot wait for the market to come around. Broilers, of course, can be frozen, but there is a limit to freezer capacity. Furthermore, when broilers are frozen instead of chilled, their value decreases. Interplay between market demand and forward planning cannot be underestimated.

130. W. CATHCART & G. RECTOR, *supra* note 104, at 12-13; B. TOBIN & H. ARTHUR, *supra* note 69, at 45-46.

131. See E. ROY, *supra* note 12, at 114; B. TOBIN & H. ARTHUR, *supra* note 69, at 114-16. See also CONSUMER & MARKETING SERVICE, U.S. DEP'T OF AGRICULTURE, PMG-6, 1969 BROILER MARKETING GUIDE 3 (May 1969) [hereinafter cited as BROILER MARKETING GUIDE].



ply of competing protein sources such as beef and pork<sup>132</sup> and the time of year,<sup>133</sup> the market can experience dramatic changes weekly or even daily.<sup>134</sup> Under such circumstances, the coordination of production with market demand has been largely a hit and miss proposition.

The nature of the broiler itself exacerbates the problem. A broiler's "shelf-life" is limited.<sup>135</sup> Because processed broilers are chilled rather than frozen,<sup>136</sup> they must be sold to the consumer within seven days after being slaughtered.<sup>137</sup> This means that the producer must sell his product within a maximum of four days from the date of slaughter,<sup>138</sup> and the exigencies of time often throw the producer on the mercy of the market. He cannot hold out for higher prices. The slogan in the trade is "sell 'em or smell 'em."

Finally, the market for broilers is oligopsonistic, dominated by large retail chains such as A & P, Kroger and Safeway<sup>139</sup> and institutional food outlets such as Kentucky Fried Chicken.<sup>140</sup> Because of their size, their

132. 1970 (2d quarter) BROILER MARKETING GUIDE, *supra* note 131, PMG-9, at 3-4 (Jan. 1970); 1969 *id.*, PMG-6, at 3, 6 (May 1969); F. FABER & R. IRVIN, *supra* note 1, at 42-43. For elasticity of demand coefficients, see V. BENSON & T. WITZIG, *supra* note 2, at 45, 46 table 32.

133. V. BENSON & T. WITZIG, *supra* note 2, at 18, table 26, 37; W. CATHCART & G. RECTOR, *supra* note 104, at 36-37 table 23.

134. This fact can be substantiated by reviewing any of the daily or weekly market reports in circulation such as the United States Department of Agriculture Market News Service (the "nine city weighted average price"), the Georgia, Alabama or Mississippi "dock" quotations, or the Georgia "live" market quotations.

135. V. BENSON & T. WITZIG, *supra* note 2, at 42-43.

136. *Id.* at 42; *see* note 129 *supra*.

137. V. BENSON & T. WITZIG, *supra* note 2, at 43.

138. The four day deadline is a rule of thumb. Time must be allowed for loading, shipping, unloading, stocking, and sale to the consumer. The time lapse in marketing varies according to the distance of the market and the customer. *See id.* at 40.

139. Concentration in the food retailing industry has increased and the trend shows no sign of abating. B. MARION, W. MUELLER, R. COTTERILL, F. DEITHMAN & J. SCHMELZER, THE PROFIT AND PRICE PERFORMANCE OF LEADING FOOD CHAINS 1970-74—A STUDY FOR THE JOINT ECONOMIC COMMITTEE, 95TH CONG., 1ST SESS. 15 (1977). Retail chains (11 or more stores) have increased their share of sales from 34% in 1948 to 57% in 1972. *Id.* at 9. The 20 largest chains now represent 37% of all sales nationally. *Id.* at 11. Concentration is particularly noticeable in urban markets, where the largest 4 retailers held an average of 52% of the market. *Id.* at 1. "Increasing concentration of purchasers restricts the alternatives open to suppliers, stimulates compensating concentration on their part, and weakens the effectiveness of competition as a self-regulating device throughout the industry." NATIONAL COMMISSION ON FOOD MARKETING, FOOD FROM FARMER TO CONSUMER 106 (1966) [hereinafter cited as FARMER TO CONSUMER].

Given the structure of the retail grocery market, it is significant that it is the most important conduit for broilers to the consumer.

In 1975, 66% of the national broiler production was sold to retail food stores. A significant portion of the retail trade was with supermarket chains. Sixty percent of the sales were direct; 40% went through wholesalers and other middlemen. V. BENSON & T. WITZIG, *supra* note 2, at 33, 35 fig. 4, 37.

140. Institutional purchasers have become an increasingly important market for broiler production, largely because of the development and growth of fast food chains. Twenty-five percent of all broilers produced go to institutions such as fast food outlets, restaurants and schools. Sixty-four percent of this volume is sold directly by the producer to the customer; 36% is sold through wholesalers. V. BENSON & T. WITZIG, *supra* note 2, at 35 fig. 4.

bargaining power and their ability to control demand through retail special-izing activities, these buyers make the market for broilers.<sup>141</sup> Once a producer commits to production, he is stuck with his output. If a major retailer refuses to purchase except at a price below production cost, the producer has to take the price.<sup>142</sup> The perishability of the product restricts his latitude in bargaining. This pattern of below-cost buying occurred with increasing frequency in the early 1970's.<sup>143</sup>

The market problems of the broiler industry are due largely to a lack of horizontal power and coordination in the market. While achieving a remarkable degree of vertical efficiency, the industry failed to come to terms with the necessity for horizontal action.<sup>144</sup> The deteriorating price situation became so serious in the late 1960's that the necessity for some kind of horizontal solution was perceived. As a direct response to the problem, NBMA was formed to bulwark the industry's vertical efficiencies with a greater degree of horizontal control.

The foregoing analytical appraisal of the broiler industry's performance in the horizontal and vertical dimensions is representative of developments in other commodity groups.<sup>145</sup> In general, the participation of off-farm integrators in agricultural production through vertical integration has produced positive and beneficial results.<sup>146</sup> New technology has been in-

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141. Vertical integration has not subdued the importance of the wholesaling middlemen. The number of broilers marketed directly in 1960 is approximately the same today (about 50%). During the 1960's, the number marketed through wholesalers declined significantly, but the trend toward direct marketing waned in the 1970's. *Id.* at 33, 35 fig. 4. The precise amount of direct distribution, however, is unknown because processor owned or controlled "wholesalers" are not broken out of the general wholesaler category.

142. The producer is not only forced to sell processed birds because of their limited shelf-life, see text accompanying note 135 *supra*, he cannot hold back the broilers he has in the grow-out stage, see note 129 *supra*.

143. During the 39 month period covered by the Government's Complaint, January 1970 through March 1973, net returns to broiler integrators on an aggregate basis were negative 21 months and positive for 18 months. The average losses were 1.69 cents per pound per month; the average positive return was only 1.02 cents per month. Rogers, *supra* note 99, at 6, *reprinted in* Joint Appendix at 476.

144. The initial response to market problems was to move the decisionmaking and risk-taking roles from the input area (feed mills and hatcheries) to the processing area. The major integrators today are processors. They are closer to the ultimate market and stand in a better position to judge demand and adjust supply. See E. ROY, *supra* note 12, at 114-15; B. TOBIN & H. ARTHUR, *supra* note 69, at 63.

145. See E. ROY, *supra* note 12, at 12; text accompanying note 65 *supra*.

146. For studies of the achievements or the potential of vertical integration in other commodities, see W. GALLIMORE & R. IRVIN, THE TURKEY INDUSTRY: STRUCTURE, PRACTICES, AND COSTS (Economic Research Service, U.S. Dep't of Agriculture, Marketing Research Report No. 1000, 1973); J. HAAS, VIABILITY OF A COOPERATIVELY COORDINATED EGG COMPLEX (Farmer Cooperative Service, U.S. Dep't of Agriculture, Marketing Research Report No. 1055, 1975); J. HASKELL, A PRODUCER-BASED COTTON MARKETING SYSTEM (Farmer Cooperative Service, U.S. Dep't of Agriculture, Marketing Research Report No. 1016, 1973); D. ROGERS, VERTICAL AND HORIZONTAL INTEGRATION IN THE MARKET EGG INDUSTRY 1955-69 (Economic

roduced, production expanded, economic alternatives brought to depressed areas, competition in the producing sector enhanced and products delivered to the consumer at a low cost. Judged purely from a performance standpoint, the participation of off-farm integrators in agriculture appears desirable.

The very success of off-farm integrators has precipitated controversy. The competitive equality (if not superiority) of off-farm integrators has put them on a collision course with on-farm producers.<sup>147</sup> While the performance of the off-farm integrators has been statistically beneficial, the ultimate evaluation cannot be divorced from political questions. Many view agriculture as the exclusive province of the family farmer and fear that the so called "corporate takeover" of farming will result in oligopolistic or monopolistic control of the nation's food supply and the subjugation of the "rugged individual tiller of the soil." To many, vertical integration is the means by which this *coup d'agriculture* will occur. The fact that these off-farm integrators also want to take advantage of *horizontal* benefits of cooperation is almost too much for the family farmer to endure.<sup>148</sup> The Chicken Case presents this explosive combination of economic realities and political tensions to the federal judiciary for evaluation in light of the antitrust laws.

## II. NBMA AND THE SHERMAN ACT

NBMA was formed at a time when the industry was suffering from serious economic depression. For several months, integrators experienced negative net returns because market prices had dropped below production costs.<sup>149</sup> Many of the industry's members believed that one way to ameliorate the hard times would be to develop and exchange reliable market information through a cooperative association of broiler producers. While they could have resorted to federally enforced broiler marketing orders as an

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Research Service, U.S. Dep't of Agriculture, ERS 477, 1971); C. WARD, INTEGRATED CATTLE MARKETING—A BETTER WAY (Farmer Cooperative Service, U.S. Dep't of Agriculture, F.C.S. Information 107, 1977). See also E. ROY, *supra* note 12, at 264-65, 327-30, 379-80, 424-25.

147. "Integration and coordination will increase. The concern of farmers is, who will control it?" W. BARR, WHO WILL CONTROL U. S. AGRICULTURE—SITUATION AND ALTERNATIVES 5 (Ohio State Univ., Dep't of Agricultural Economics, ESM 490, 1973). See also Knutson, *Cooperative Strategies in Imperfectly Competitive Market Structures—A Policy Perspective*, 56 AM. J. AGRICULTURAL ECON. 904, 906 (1974).

148. Yet the family farmer is suspect, too. There are some who find no solace in the growing power of farmer-run cooperatives, and who charge that the oligopolies and monopolies feared of corporations are already realities in the hands of family farmers themselves. See authorities cited note 252 *infra*.

149. 1967 and 1970 were especially hard years for the broiler industry. From January through December of 1967, net returns to broiler producers were negative. For the period April 1970 through March 1971, returns were negative. Rogers, *supra* note 99, at 6 reprinted in Joint Appendix at 476. See also V. BENSON & T. WITZIG, *supra* note 2, at 7 table 4.

alternative,<sup>150</sup> the founders of NBMA evidently preferred a cooperative solution. Cooperation would give them a means of coming to grips with the problems of the marketplace that at the same time would preserve the entrepreneurial independence of the individual producer. Accordingly, NBMA was organized and chartered in September of 1970 under the authority of the Georgia Cooperative Marketing Act.<sup>151</sup> Thereafter, according to the government, "[t]he members of the cooperative routinely exchange[d] price information and attempt[ed], in other ways, to ensure a market at stable prices for their products."<sup>152</sup> The Justice Department has alleged that these activities<sup>153</sup> violated section one of the Sherman Act because NBMA did not qualify as a Capper-Volstead cooperative.<sup>154</sup>

At the time of NBMA's formation, there were no indications that integrated producers could not avail themselves of the benefits of the Capper-Volstead Act<sup>155</sup> and the Cooperative Marketing Act of 1926.<sup>156</sup> In fact, signals from the Justice Department had been encouraging. In November of 1969, the Justice Department issued a business review letter to the National Egg Company, a Capper-Volstead cooperative, which advised that the Ralston-Purina Company could join the cooperative without causing it to forfeit its exempt status.<sup>157</sup> Under the Justice Department's then prevailing

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150. The Agricultural Adjustment Act, 7 U.S.C. §§ 601-602 (1970), authorizes the Secretary of Agriculture, upon request and with approval of the industry, and upon a showing of specified circumstances, to implement and enforce production and price controls. The Department of Agriculture had investigated the feasibility of marketing orders for broiler production in the early 1960's. When, however, a specific approach could not be agreed upon, the investigating commission, the Broiler Stabilization Advisory Committee, disbanded. B. TOBIN & H. ARTHUR, *supra* note 69, at 91-93. Producers of broilers and other commodities such as turkeys and wheat resisted the lure of marketing orders. B. TOBIN & H. ARTHUR, *supra* note 69, at 92-93.

151. GA. CODE ANN. §§ 65-201 to -231 (1966 & Cum. Supp. 1977).

152. Brief for the United States in Opposition to Petitioner's Petition for a Writ of Certiorari 2.

153. See note 30 and accompanying text *supra*. In particular, the Justice Department alleged that NBMA, in violation of § 1 of the Sherman Act, tried

- (a) to exchange information about past, present, and future prices for broilers;
- (b) to establish and disseminate a price for broilers;
- (c) to sell broilers at or above that price;
- (d) to report to NBMA surplus broilers that cannot be sold at that price;
- (e) to sell undergrades at agreed on discounts from the Grade A price;
- (f) to withhold broiler parts from the market in order to increase their price;
- (g) to exchange information about past, present, and future production of broilers;
- (h) to sell surplus broilers to customers in foreign countries.

Amended Government Complaint ¶ 9.

154. Brief for the United States in Opposition, *supra* note 152, at 1-2.

155. 7 U.S.C. §§ 291-292 (1970).

156. *Id.* § 455.

157. Business Review Letter Re: "National Egg Company—Request for Business Review" from Richard W. McLaren, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to

view, the bearing of the risk of loss of the agricultural product distinguished farmers from nonfarmers for the purpose of determining the availability of exemptions from the antitrust laws.<sup>158</sup> Because of the favorable climate, NBMA organized without requesting a business review letter of its own.

In the late fall of 1970, Holly Farms Poultry Industries, Inc., a North Carolina broiler producer, decided to join NBMA. Desiring to chart its course carefully in order to avoid violation of the antitrust laws, Holly Farms requested a business review letter with regard to its proposed affiliation with NBMA.<sup>159</sup> A year later the Justice Department answered the inquiry by reversing its previous interpretation of the law.<sup>160</sup> It advised Holly Farms that the antitrust immunity of Capper-Volstead does not extend to agricultural production by integrated producers using contract growers.<sup>161</sup> The Department also issued a second letter to the National Egg Company

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Irving Isaacson, Esq., att'y for National Egg Company (Nov. 24, 1969) (copy on file in office of *North Carolina Law Review*). "[I]t is our opinion that Ralston-Purina is 'engaged in the production of agricultural products.'" *Id.* National Egg Company wanted assurance that Ralston-Purina, an integrated producer, would not be considered a "non-producer" whose membership would disqualify the cooperative from Capper-Volstead protection. See *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967). Ralston-Purina was engaged in egg production and, like broiler integrators, used contract growers.

158. As originally formulated and enunciated, the Justice Department's test would have made anyone who bears a substantial part of the risk of loss of the agricultural "crop" eligible for membership in an exempt cooperative. This test was outlined by Charles D. Mahaffie, Jr., then Chief of the Trial Section, Antitrust Division, in an address before the Springfield Bank for Cooperatives in 1971:

One of the things that sets farmers apart from other businessmen is the fact that "their economic fate was in large measure dependent upon contingencies beyond their control." *This is the risk of loss of a crop.* If drought or hail wipes out a crop, or if animals become diseased and die, a farmer will lose the fruits of his investment in land, buildings and equipment and he will lose the fruits of his own labor for an entire growing season. . . . In my view *one who does not bear this risk*, or at least a substantial part of it, is not a farmer and is not entitled to the benefits of the agricultural exemption from the antitrust laws.

Address by C. Mahaffie, Jr., Chief, Trial Section, Antitrust Div., U.S. Dep't of Justice, Springfield Bank for Cooperatives, Cherry Hill, N.J., 15-16 (Aug. 18, 1971) (quoting *Tigner v. Texas*, 310 U.S. 141, 145 (1940)) (emphasis added) (copy on file in office of *North Carolina Law Review*). Mr. Mahaffie's comments indicate that the Justice Department then assumed that the loss of the crop would trigger the loss of investment in land, buildings, and equipment.

159. Application for Business Review (Nov. 25, 1970) (copy on file in office of *North Carolina Law Review*).

160. Business Review Letter Re: "Holly Farms Poultry Industries, Inc.—Request for Business Review" from Richard W. McLaren, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to William H. McElwee, Esq., att'y for Holly Farms Poultry Industries, Inc. (Nov. 17, 1971) (copy on file in office of *North Carolina Law Review*).

161. [I]t appears that more than 97% of the broilers that Holly Farms deals in are produced on farms neither owned nor operated by Holly Farms, in accordance with agreements that leave a substantial part of the risk connected with the production of the broilers on the owners of the farms. We do not consider this part of Holly Farms' broiler handling to qualify it as a person "engaged in the production of agricultural products as [a farmer]". . . .

*Id.* at 1-2.

rescinding its previous ruling.<sup>162</sup> The Justice Department's action signaled a shift from its definition of "farmer" as one who bears the risk of loss of the product to one who bears the risk of loss of his investment in "land, buildings and equipment."<sup>163</sup>

Seeking an authoritative decision on the exemption issue, NBMA and Holly Farms filed suit under the Administrative Procedure Act<sup>164</sup> for a declaratory judgment.<sup>165</sup> Meanwhile, the Justice Department took the offensive by bringing an antitrust action against NBMA in the United States District Court for the Northern District of Georgia.<sup>166</sup> Upon the Justice Department's motion, the declaratory judgment action was dismissed<sup>167</sup> and the parties squared off in the Georgia forum.

The district court, adopting the risk of loss of product test, found that NBMA's integrator-members were sufficiently involved in the production of broilers from a risk standpoint "to justify their classification as '[p]ersons engaged in the production of agricultural products as farmers . . . ' within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute."<sup>168</sup> The Justice

162. Business Review Letter Re: "Reexamination of National Egg Company Business Review" from Richard W. McLaren, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Irving Isaacson, Esq., att'y for National Egg Co. (Nov. 17, 1971) (copy on file in office of *North Carolina Law Review*).

163. Address by C. Mahaffie, Jr., Chief, Trial Section, Antitrust Div., U.S. Dep't of Justice, Legal Tax and Accounting Comm. of the National Council of Farmer Cooperatives, Phoenix, Ariz. 8 (Jan. 11, 1972) (copy on file in office of *North Carolina Law Review*). The Justice Department noted that Holly Farms did not "assume substantially all the risk typically inherent in the role of a farmer," and placed special emphasis on ownership of a farm and buildings. The rationale (although not the result) has been criticized by a Department of Agriculture official:

The conclusion that Holly Farms does not bear substantially all the risk is an interesting one since Holly Farms held title to the fowl, supplied all feed and certain management inputs, and paid producers on the basis of a minimum price per bird delivered with an escalator if the market price was above specific levels. The farmer essentially was paid a piece wage which depended upon the number of birds delivered. His most significant risk was that of disease and other natural disasters which could result in bird losses. *If Justice came to the right conclusion, it appears to have done it for the wrong reason.*

*Food Price Investigation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 15,528 n.23 (1973) (paper by R. Knutson, Staff Economist, Agricultural Marketing Service entitled "Antitrust Application to Contemporary Food Production and Marketing Issues") [hereinafter cited as *Food Price Investigation*].

164. 5 U.S.C. §§ 701-706 (1970).

165. *Holly Farms Poultry Indus., Inc. v. Kleindienst*, Civil Action No. C-151-W-72 (M.D.N.C., filed —, 1972).

166. *United States v. National Broiler Marketing Ass'n*, Civil Action No. 18173 (N.D. Ga., filed April 16, 1973).

167. *Holly Farms Poultry Indus., Inc. v. Kleindienst*, 1973-1 Trade Cas. ¶ 74,534 (M.D.N.C. 1973) (Ward, J.).

168. *United States v. National Broiler Marketing Ass'n* 1975-2 Trade Cas. ¶ 60,509, at 67,223. The parties stipulated the facts and judgment was rendered granting NBMA's motion

Department appealed the district court decision to the Fifth Circuit and won a reversal<sup>169</sup> on the ground that "Congress clearly meant to limit the benefits of the Capper-Volstead Act to persons who own or operate farms."<sup>170</sup> The final determination is now in the hands of the Supreme Court, which granted NBMA's certiorari petition.<sup>171</sup> The Court will have the opportunity to resolve the three basic issues underlying the Chicken Case, each of which is analyzed in the following material.

A. *Participation and Competition of Off-Farm Integrators in the Production, Processing and Marketing of Agricultural Commodities*

Before attempting to determine whether off-farm integrators should be allowed to take advantage of the benefits of Capper-Volstead cooperation, it is first necessary to determine whether off-farm integrators should be involved in agriculture at all. Family farmers<sup>172</sup> and their friends have been fairly successful in advertising the spectre of the "corporate takeover" of farming,<sup>173</sup> and have advanced numerous reasons why "corporate conglomerates" should be barred entirely from agricultural production.

Those opposed to the participation of "agribusiness" argue that the family farmer is a more efficient laborer than is the corporate absentee landlord and that the farmer can reach a profitable economy of scale at a reasonable size.<sup>174</sup> Family farmers also point up the dangers of monopoly in

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for partial summary judgment and denying the Justice Department's cross-motions for partial summary judgment.

169. 550 F.2d 1380 (5th Cir. 1977).

170. *Id.* at 1386.

171. 98 S. Ct. 260 (1977) (No. 77-117).

172. Precisely who is a "family farmer" is often disputed. The historical meaning of the term envisions a farm owned or managed by an individual (or family) who also provides all or a substantial part of the labor necessary to operate the farm. Other candidates for family farm status include tenant farmers, who work their farms but do not own them, and large-scale farming operations in which the family labor contribution is more than 50%. See *Family Farm Act Hearings*, *supra* note 8, at 53-55 (statement of Professor Richard D. Rodefeld), 119 (statement of Ben. H. Radcliffe, Executive Committee Member, National Farmers Union), 163 (statement of John W. Scott, Master of the National Grange) for classification schemes.

173. In the 1960's and early 1970's a number of large corporations, many of them conglomerates, bought their way into food production. Some of these corporations included: Tenneco (vegetables); Ralston-Purina (broilers); Pillsbury (broilers); ITT (pork products); Gates Rubber (sugar beets); and Ling-Temco-Vought (turkeys). One observer was moved to comment: "Sunday dinner just isn't what it used to be: the turkey is from Greyhound and the ham is from ITT; the fresh vegetable salad is from Tenneco, with lettuce from Dow-Chemical; potatoes by Boeing are placed alongside a roast from John Hancock Mutual Life; and there are afterdinner almonds from Getty Oil." *Food Price Investigation*, *supra* note 163, at 357 (testimony of James Hightower, Director, Agribusiness Accountability Project). The involvement of these firms in food production precipitated an outcry from their real and potential competitors, many of whom are "family farmers." The family farmer lobby gave the public the impression that their situation was desperate. ("Corporate America surrounds the independent family farmers." *Id.* at 362).

174. *Id.* at 361-62; *Family Farm Act Hearings*, *supra* note 8, at 15 (statement of Representative James Abourezk).

the food production area.<sup>175</sup> They theorize that the elimination and replacement of hundreds of thousands of small farmers by a few agribusiness giants will unduly concentrate market power to the ultimate disadvantage of the consumer.<sup>176</sup> From a sociological standpoint, family farm proponents have identified a "social need to keep people on the land."<sup>177</sup> Finally, in step with the times, family farmers claim to be better conservationists than "absentee conglomerate landlords" who commit "environmental rape of vast areas of the countryside."<sup>178</sup>

After cutting through the rhetoric, it becomes apparent that the opposition to agribusiness involvement in agriculture is based on the small farmer's real fear that he will be unable to compete. Family farmers feel particularly threatened by the ability of vertically integrated organizations to "farm at a loss" and use profits from other activities, such as processing and retailing, to subsidize or recoup their losses. This practice would provide vertically integrated agribusiness with competitive advantages in the production of commodities without any real regard to the efficiency of production. The vertically integrated firm could be less efficient than the family farmer at the production level, incur losses, but use earnings from other stages of production to offset these losses.<sup>179</sup>

The fears of family farmers have been translated into political action in several states. North Dakota, for example, generally<sup>180</sup> prohibits any kind of corporate involvement in agricultural production.<sup>181</sup> Six other states substantially restrict the activities of certain corporations in farming.<sup>182</sup> On the national level, there have been unsuccessful attempts to proscribe involve-

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175. *Family Farm Act Hearings*, *supra* note 8, at 91 (statement of Representative Arthur A. Link); 134 (statement of Harold F. Breimyer, Professor and Extension Economist, University of Missouri).

176. *Id.* at 15 (statement of Representative James Abourezk). See also Knutson, *Definition of Producer is Critical Policy Issue*, 41 NEWS FOR FARMER COOPERATIVES, Aug. 1974, at 17.

177. *Family Farm Act Hearings*, *supra* note 8, at 15; *accord, id.* at 92 (statement of Representative Arthur A. Link), 119 (statement of Ben H. Radcliffe, Executive Committee Member, National Farmers Union), 121-24 (statement of John A. Wilson, Legislative Director, National Sharecroppers Fund).

178. *Id.* at 16 (statement of Representative James Abourezk).

179. *Id.*

180. N.D. CENT. CODE § 10-06-04 (1976) exempts "cooperative corporations," 75% of whose members or shareholders are "actual farmers," from the prohibition. "Actual farmers" are those who live on the land or earn their living principally from agriculture. *Id.*

181. *Id.* §§ 10-06-01 to -06. The constitutionality of this law has been upheld. *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945). See also *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).

182. IOWA CODE ANN. §§ 172C.1 to .15 (West Cum. Supp. 1977-78); KAN. STAT. §§ 17-5901, -5902 (1974); MO. ANN. STAT. §§ 350.010 to .030 (Vernon Cum. Supp. 1977); OKLA. STAT. ANN. tit. 18, §§ 951-954 (West Cum. Supp. 1976-77); S.D. COMPILED LAWS ANN. §§ 47-9A-1 to -23 (Supp. 1977); WISC. STAT. ANN. § 182.001 (West Cum. Supp. 1977-78).



ment in farming by large corporations through the adoption of a family farm antitrust bill.<sup>183</sup>

Aside from the seven states where anticorporate legislation is in effect, and aside from periodic feints to get similar legislation through Congress, there is no legal barrier to agribusiness participation in agricultural production. There are, however, traces of a certain instinctive resistance to "corporate farming" that has little basis or justification in economic reality. This instinctive resistance surfaces in the Fifth Circuit opinion in the *Chicken Case*:

NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word "farmer" has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is "agribusiness." "Farmer" still means what it meant in 1922—one who owns or operates a farm.<sup>184</sup>

The Fifth Circuit's paradoxical musings exhibit the frailties of romantic conditioning. Even if the "ordinary, popular meaning" of farmer has not changed since 1922, the ordinary, popular farmer definitely has. The distinction the Fifth Circuit attempts to draw between off-farm integrators and on-farm producers today is functionally nonexistent in most instances.

The Fifth Circuit's acknowledgement that "agriculture has changed much" is glib understatement. Agriculture and agriculturalists have undergone a tremendous transformation since 1922. Today's major farms are larger,<sup>185</sup> more mechanized<sup>186</sup> and more technologically advanced<sup>187</sup> than

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183. H.R. 11654, 92d Cong., 1st Sess., *Family Farm Act Hearings*, *supra* note 8, at 2-5; S. 840, 95th Cong., 1st Sess. (Family Farm Antitrust Act of 1977). The most recent version of the bill would make it an antitrust violation for enterprises whose nonfarming assets exceed \$3 million to "engage, directly or indirectly, in farming or the production of agricultural products." *Id.* § 3(a). The bill has never been favorably reported out of committee. Extensive hearings were held on H.R. 11654 and similar bills in March 1972. Comment from major witnesses, including representatives from the Departments of Agriculture and Justice, was not favorable. See generally *Family Farm Act Hearings*, *supra*.

184. 550 F.2d at 1386.

185. The average farm in 1976 had 389 acres, compared with 151 acres in 1930. ABSTRACT, *supra* note 4, at 632 table 1065. Farms with sales exceeding \$40,000 per year constituted 16% of all farms in 1975, but accounted for 67.5% of all gross farm income. *Id.* at 646 table 1093 (derived). The average acreage of these farms was 1,611 acres in 1969. *Id.* at 635 table 1071. Farms in the \$20,000-\$39,999 bracket represented 20.1% of all farms and accounted for 19.2% of all gross farm income in 1975. *Id.* at 646 table 1093. The average acreage of these farms in 1969 was 626 acres. *Id.* at 635 table 1071. Using the 1969 data base for acreage and the 1975 data base for gross sales, it can be interpolated that 86.7% of gross farm income nationally is attributable to production on farms that average around 1020 acres in size. Compare *id.* at 635 table 1071 (derived) with *id.* at 646 table 1093 (derived).

186. Despite a marked decline in the number of farms and farmers, the numbers and kinds of farm machinery are far greater today than in the early 1920's. The number of tractors

their turn-of-the-century counterparts. Farm management has become an industrial science complete with its own regalia of input matrices, cost curves and production margins.<sup>188</sup> Cultivated land is likely to be leased,<sup>189</sup> and investment capital for expansion is usually borrowed.<sup>190</sup> A fair degree of vertical integration has been achieved as well, either independently through the use of futures markets and management or forecast advisory services,<sup>191</sup> or cooperatively through supply and marketing associations.<sup>192</sup> The farming operations that have achieved these technological, managerial and financial efficiencies now account for an estimated two-thirds of all farm production, even though they comprise only sixteen percent of all farmers.<sup>193</sup>

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increased from 246,000 in 1920 to 4,109,000 in 1976; farm motor trucks from 139,000 to 2,870,000; grain combines from 4,000 to 655,000; corn pickers from 10,000 to 585,000; and pickup balors and field forage harvesters from none in 1920 to 574,000 and 280,000, respectively, in 1976. CHANGES IN FARM PRODUCTIVITY AND EFFICIENCY, *supra* note 117, at 29 table 30. These statistics are representative only and do not reflect technical advances made in farming equipment since the 1920's. Another measure of mechanization is the rise in productivity per man-hour. Since 1920, the man-hour output of farm workers has increased 940%. *Id.* at 44 table 450. Measured in terms of input, use of farm labor has declined 76% while use of mechanical power and machinery has increased 325%. *Id.* at 55-56 table 56.

187. "[C]hanges are reducing the number of workers required in agriculture, increasing the efficient size for a farm, and transforming the farm into a business requiring skillful management, high technical competence and large investment." FARMER TO CONSUMER, *supra* note 139, at 101.

188. See *How the Family Farm Can Harvest Millions*, BUS. WEEK, July 4, 1977, at 68; Knutson, *Family Farmers Can Earn Membership in Tomorrow's Industrialized Agriculture*, 40 NEWS FOR FARMER COOPERATIVES, Feb. 1974, at 1, 4-5.

189. At present, almost 38% of all farmland is rented, either by active operators seeking additional acreage (24.6%) or by tenant farmers (12.9%). See B. JOHNSON, FARMLAND TENURE PATTERNS IN THE UNITED STATES 3 table 1 (Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economic Report No. 249, 1974). Because of rising real estate values, leasing will become an increasingly prevalent means of financing farm operations. *Id.* at 35-37. See also ABSTRACT, *supra* note 4, at 634 table 1068.

190. See ABSTRACT, *supra* note 4, at 647 table 1094; ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AFS—2, AGRICULTURAL FINANCE STATISTICS (1974). See also *How the Family Farm Can Harvest Millions*, *supra* note 188.

191. *How the Family Farmer Can Harvest Millions*, *supra* note 188. The use of management and forecast advisory services, and resort to futures markets enables the producer to coordinate its production with the demands of better-defined markets. While this activity does not constitute vertical integration in the classic sense, it serves the same ends as vertical integration: a closer coordination between production and post-production stages of the food chain. See also A. PAUL, R. HEIFNER & J. HELMUTH, FARMERS' USE OF FORWARD CONTRACTS AND FUTURES MARKETS (Economic Research Service, U.S. Dep't of Agriculture, Agriculture Economic Report No. 320, 1976).

192. Integration through cooperative associations is the most prevalent form of producer-based integration. Inputs and production adjuncts may be coordinated through supply cooperatives and the post-production stages may be handled by association-controlled processors, transporters and marketers. See, e.g., *Agfoods' Forward Distribution Smooths Marketing, Cuts Costs*, 42 NEWS FOR FARMER COOPERATIVES, July 1975, at 9; *Better Coordination Could Net Increased Produce Returns*, 43 *id.*, Nov. 1976, at 20; *Cooperative Marketing Alternatives Outlined for Florida Cattlemen*, 44 FARMER COOPERATIVES, Apr. 1977, at 20; *Cotton Producer System Can Cut Costs \$15 a Bale*, 41 NEWS FOR FARMER COOPERATIVES, Apr. 1974, at 11; *Local Cooperatives in Integrated Pest Management*, 43 FARMER COOPERATIVES, Mar. 1977, at 17.

193. ABSTRACT, *supra* note 4, at 646 table 1093.

Simple indicators suggest that the economic characteristics of farming and vertically integrated "agribusiness" are not as disparate as many people assume. They are, in fact, functionally similar. While the direction from which most investment and production incentives come may have been changed, differences, if they exist, are likely to be matters of degree<sup>194</sup> rather than substance. For farming in the classical sense, the incentives originate from individual producers and spread outward to input or post-production stages.<sup>195</sup> For "agribusiness," the initiatives originate off-farm in the input or post-production stages and spread forward or backward into the production area.<sup>196</sup> If the goals of modern agricultural enterprise are to stabilize the economic viability of production units through closer coordination between all stages of input, production, processing and marketing, to achieve optimum economies of scale and technical efficiency in production, processing and distribution, and to deliver a wholesome product to the consumer at the lowest possible price, then the law should be neutral as to whether these goals are realized through the initiatives of on-farm or off-farm firms. Unfortunately, the ingrained bias of "the common run of people," as translated by the Fifth Circuit, causes resistance to the entry of off-farm firms into agricultural production. Both the Department of Agriculture and the Department of Justice, however, have opposed any attempt to prevent off-farm firms from participating and competing in agricultural production.

From the standpoint of production and marketing, the Department of Agriculture has taken the position that "closer coordination between production and marketing processes through contractual or integrated arrangements has been beneficial to both producers and consumers by supplying more uniform and higher quality food products than otherwise could have been obtained at prevailing product prices."<sup>197</sup> The broiler industry is often cited as an example of the achievements of a closely coordinated system.<sup>198</sup> From the standpoint of antitrust policy, the Justice Department has warned

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194. For example, vertically integrated agribusiness is more likely to exercise a greater degree of control over the various stages of production in which it is involved because decision-making is centralized. Although the on-farm producer might achieve a degree of vertical integration through self-help (futures markets, etc.) or cooperation, the vertical control is less centralized and more subject to external influences. While the degrees of vertical coordination may differ, the results will be roughly the same if efficient coordination is achieved.

195. The sugar beet and potato processing ventures discussed in the authorities cited in notes 21 & 22 *supra* are examples of producer-originated initiatives toward vertical integration.

196. The success of the broiler industry exemplifies the result of initiatives taken by off-farm integrators to integrate vertically into the broiler production stage.

197. *Family Farm Act Hearings*, *supra* note 8, at 21 (testimony of J. Phil Campbell, Under Secretary of Agriculture).

198. *See id.* at 21-22, 46-47.

against restricting competition in agricultural production and limiting "the ability of persons to choose the economic endeavors that they wish to pursue."<sup>199</sup> Nothing is inherently anticompetitive or illegal about vertical integration or conglomerate organization. "In economic terms, vertical integration may yield advantages in efficiencies and cost-savings, while a conglomerate structure may be able to provide the heavy financing required by a subsidiary in a capital intensive field."<sup>200</sup> The real anticompetitive danger in agriculture is the threatened exclusion of off-farm firms from competition.<sup>201</sup>

The proponents of the family farm will undoubtedly continue to voice their fears of the corporate invasion of the sanctimonium of agriculture. Such diatribe is a ruse that bears little relation to reality. Off-farm firms have entered into agricultural production. While some of the big boys have withdrawn after suffering losses,<sup>202</sup> smaller firms remain and, through various forms of vertical integration, are achieving goals that both the Departments of Agriculture and Justice applaud as beneficial.<sup>203</sup> At the same time, these off-farm firms are competing with large, vertically coordinated on-farm enterprises that have posted respectable performance records of their own. If the small family farmer's viability is in fact jeopardized, the threat comes from the larger on-farm producers rather than from off-farm firms.<sup>204</sup> Without the contract growing arrangements adopted by many off-

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199. *Id.* at 78 (testimony of Bruce B. Wilson, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

200. *Id.*

201. [O]ur success has been based to a considerable extent on the ability of our farm producers to achieve economies of scale through capital intensive technology rather than labor intensive methods of farming.

Prohibiting companies with large nonfarm activities from engaging in agricultural pursuits may eliminate from the market many of the companies which possess the necessary financial resources to make full use of these technological developments.

*Id.* at 79.

202. Some of the large corporations and conglomerates that entered the field of agricultural production, among them Ralston-Purina, Purex, Tenneco and Gates Rubber, found their ventures unprofitable and withdrew or cut back substantially their investments. *Id.* at 29-30 (testimony of J. Phil Campbell, Under Secretary of Agriculture).

203. *Id.* at 23, 28, 41, 49 (testimony of J. Phil Campbell, Under Secretary of Agriculture), 79, 81 (testimony of Bruce B. Wilson, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

204. The competitive problem of the small family farmer lies in his disadvantaged position as against the more efficient scale of operations of the large corporate farmer, whether or not the latter is associated with a nonfarming firm. . . . [T]he majority of corporate farming operations are conducted by firms wholly engaged in agriculture and not affiliated with outside interests.

Thus, barring vertically integrated firms and conglomerates would still leave the small farmer facing the same problems with the remaining corporate farmers.

*Id.* at 79 (testimony of Bruce B. Wilson, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

farm integrators, the smaller farmer would have been eliminated years ago.<sup>205</sup>

The distinction between "agribusiness" and "farmer," therefore, is not so clear as some would suggest. Whether the initiatives originate on-farm or off-farm, the resulting enterprises tend to be large, technologically progressive, managerially sophisticated and vertically integrated to some degree. Despite the functional similarities, however, the Fifth Circuit automatically categorized one as "farmer" and the other as "agribusiness." The categorization is on the order of Mr. Lincoln's dog.<sup>206</sup>

From a realistic point of view, nothing prevents "agribusiness" from being a "farmer," or vice versa, since each has taken on some of the attributes of the other. Antitrust policy militates against the exclusion of off-farm integrators from competition.<sup>207</sup> To do so would be anticompetitive and adverse to the interests of the small farmer, many of whom benefit from contract growing arrangements. Agribusiness firms should be allowed to participate and compete in the production, processing and marketing of agricultural commodities, and no legal disability should be imposed on them through special and arbitrary distinctions attributable to their off-farm origins. The question remains whether off-farm integrators should also be allowed to take advantage of the Capper-Volstead Act.

#### *B. The Extension of Benefits of the Capper-Volstead Act and Related Statutes to Off-Farm Integrators*

The Fifth Circuit has defined "farmer" and "farming" narrowly, to the exclusion of broiler integrators: "Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership."<sup>208</sup> "Farmer" still means what it did in 1922—one who owns

205. *Id.* at 21-22, 23, 49 (testimony of J. Phil Campbell, Under Secretary of Agriculture).

206. "[W]hen they asked Mr. Lincoln how many legs the dog had, he said, 'Four.' They asked him, 'If you called the tail a leg, how many legs does the dog have?' And he said 'four, because calling a tail a leg doesn't make it a leg.'" Calling a vertically integrated production system "agribusiness" doesn't necessarily make it a non-farmer. Apologies to Mr. Lincoln and to Representative William L. Hungate of Missouri. *See id.* at 16 (statement of Representative William Hungate).

207. The Department of Justice has traditionally opposed special exemptions from the antitrust laws. It is equally opposed to special exemptions from the workings of the competitive system underlying those laws. No sector of the economy should be insulated from competitive forces unless particular circumstances clearly demonstrate that competition cannot adequately regulate its conduct.

*Id.* at 77 (testimony of Bruce B. Wilson, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

208. 550 F.2d at 1386.

We cannot conceive that the ordinary, popular sense of the word "farmers" would fit broiler integrator companies. The husbandry of the broiler flocks is carried out neither by these firms nor by their employees, but by the contract growers. The farms where

or operates a farm."<sup>209</sup> Under this interpretation of the law, off-farm integrators who rely on contract growing arrangements must own or operate the farm on which their agricultural products are produced in order to be included within the Capper-Volstead meaning of "[p]ersons engaged in the production of agricultural products as farmers."<sup>210</sup> The law, however, is not made of such gossamer stuff as this.

Suppose all of NBMA's members, in response to the Fifth Circuit's ruling, buy out or lease<sup>211</sup> their growers' operations and contract for their services on a wage basis.<sup>212</sup> Little has changed. The integrator still supplies chicks, feed and medicine, makes all production decisions, supervises the grow-out and controls his growers, but now the control is wage oriented rather than contractual. Employment agreements, however, are also matters of contract, and the wage rate can be raised or lowered, or the agreement terminated.<sup>213</sup> The only tangible change is in the status of the grower. He is a wage laborer instead of a quasi-independent grower. Perhaps the integrator now has a greater investment in the buildings and land used for the grow-out, which, however, represent only a fraction of the total production cost (and investment risk) of raising broilers.<sup>214</sup> Yet this same integrator, because he now owns or operates a farm, can legally join with other integrators to form a Capper-Volstead cooperative. The Fifth Circuit test is a legal distinction without an actual economic implication. Why should such a nimble shift of operational structure involving assets of economic (and competitive) insignificance dictate a complete reversal of results for antitrust purposes? The answer is that it should not.

Because the Fifth Circuit's test determines Capper-Volstead eligibility without regard to the real economic risks of the farming enterprise, it is

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the husbandry is done are not owned by NBMA members or their employees, but by these growers.

*Id.* On the basis of stipulated facts, it is difficult to see how the Fifth Circuit came to the conclusion that the integrators did not become involved in the "husbandry" of broiler flocks. The integrators made all decisions with respect to egg placements and broiler chick hatchings. Although integrators then delivered the chicks to the growers for raising, they at all times made the decisions concerning diet, feed and growth.

209. *Id.*

210. 7 U.S.C. § 291 (1970).

211. Since the test is "owns or operates," presumably it is broad enough to include leasing. This conclusion is further supported by the fact that tenant farmers and sharecroppers are considered "farmers" for Capper-Volstead purposes. See note 232 and text accompanying notes 232-33 *infra*.

212. By making growers employees of the integrator, the entire grow-out stage falls under the direct control of the integrator.

213. Since the integrator undoubtedly becomes an "agricultural producer" with respect to the actual raising of the birds, he is exempt from the Fair Labor Standards Act minimum wage requirements. *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977).

214. See *V. BENSON & T. WITZIG*, *supra* note 2, at 4 table 1.

doubly unsatisfactory: it provides all integrators a means of obtaining Capper-Volstead coverage without regard to the risks they may take in the marketplace and it virtually assures the elimination of the contract grower from the entrepreneurial class.

### 1. Who Is a "Person Engaged in the Production of Agricultural Products"?

In formulating its test, the Fifth Circuit turned to the Capper-Volstead Act's legislative history for guidance. Given the rhetoric of the times, the legislative history is replete with references to "small holder[s] of land"<sup>215</sup> and "individual ownership and proprietorship of the soil."<sup>216</sup> The legislative history also abounds with anticorporate bias<sup>217</sup> and clearly indicates that processors and packers, whether they buy their supplies from farmers on the open market or under contract, are not eligible for Capper-Volstead privileges.<sup>218</sup> On the basis of such descriptive references, the Fifth Circuit ruled that a Capper-Volstead "farmer" must own or operate a farm. The analysis is deficient because it does not go far enough.

215. 62 CONG. REC. 2050 (1922) (remarks of Senator Kellogg).

216. *Id.* at 2051.

217. The anticorporate bias of the cooperative movement got an early start. At the debates on § 6 of the Clayton Act, Representative Quin paid the following compliments to the world of capitalism: "Can any man . . . think of an organization of thieves equal to that gigantic aggregation of capitalists who form the Beef Trust? Why is it that none of these men are wearing stripes in the penitentiary?" 51 *id.* at 9546 (1914). This anticorporate bias carried through to the debates on the Capper-Volstead bill. See 62 *id.* at 2052, 2216 (remarks of Senator Townsend), 2060, 2061 (remarks of Senator Capper), 2121, 2156-57 (remarks of Senator Walsh), 2257 (remarks of Senator Norris), 2262 (1922) (remarks of Senator Hitchcock).

218. Senator Phipps offered an amendment to the Capper-Volstead bill that would have extended antitrust immunity to processors of agricultural products who had entered into pre-planting contracts with farmers. 62 *id.* at 2273 (1922). After some pointed debate, *id.* at 2274, the Senate rejected the proposed amendment. *Id.* at 2275. The chief fear of allowing the amendment was expressed by Senator Kellogg:

[I]f they [the processors] make contracts with the producers of the raw materials, the packers, the sugar manufacturers, or anybody manufacturing anything where the raw product is produced on the farms can combine under this bill. If the Senate wishes absolutely to defeat the bill, it ought to adopt this amendment; otherwise not.

*Id.* at 2274.

While the rejection of the proposed Phipps Amendment does indicate that Congress was unwilling to extend the benefits of cooperation downstream to processors operating under simple commodity supply agreements, it "does not reveal the intent of Congress concerning those involved in the various stages of production in addition to manufacturing or who already own the products and do not purchase from a farmer." 1975-2 Trade Cas. ¶ 60,509, at 67,220-21 (Henderson J.). Even the Fifth Circuit acknowledged the differences between broiler contracting and the practices described in the Phipps Amendment. "[W]e concede that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by the Phipps Amendment . . ." 550 F.2d at 1389. The Fifth Circuit went on to rely on the Phipps debates anyway. *Id.* The only "irreducible medium" the debates suggest is that the entity seeking Capper-Volstead privileges must produce the product. See 62 CONG. REC. 2156-57 (1922) (remarks of Senator Walsh).

Capper-Volstead's legislative history must be considered in the context of the times that produced it. Modern forms of integrated commercial production—broiler or otherwise—were unknown and unanticipated in 1922. It is difficult to divine congressional intent toward a form of agricultural production that was not yet visibly in existence. The formidable problem with interpreting and applying Capper-Volstead's legislative history, then, is its failure to address the operating forms that developed and were adopted by producers subsequent to the Act's adoption. Technical developments in farming have rendered much of the descriptive worth of the debates obsolete. If Senator Kellogg were alive today, for example, he would undoubtedly be embarrassed by his fearless declaration that "the farmer can not consolidate his land into great holdings or into corporate ownership . . . ." <sup>219</sup> Today, of course, vast consolidations in land ownership have occurred and corporate farms have come into existence. <sup>220</sup> Neither factor has precluded the farmers involved from becoming members of cooperative associations. <sup>221</sup> If the Fifth Circuit is consistent in its reliance on the descriptive worth of the legislative history, however, these large scale and corporate farms must be excluded from the Act's coverage, even if they are owned and operated by family groups.

Although the legislative history sheds little light on the meaning of "producer" or "farmer," <sup>222</sup> it is instructive as to the fundamental policy and purpose of the Act. The Fifth Circuit was preoccupied with *descriptions* of the problems facing agriculture in 1922, rather than with a comprehensive analysis of their *causes*. Its focus was wrong. The Act's intended scope

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219. 62 CONG. REC. 2051 (1922).

220. With regard to consolidation of land holdings, see note 185 *supra*. In 1969, corporate farms comprised .6% of the total number of farms but accounted for 15.3% of all business receipts. G. COFFMAN, FARM CORPORATIONS: A FINANCIAL ANALYSIS 2 table 1 (Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economic Report No. 241, 1973).

221. Because of the anticapitalistic tone of the Capper-Volstead debates, and because of the statements by some of Capper-Volstead's staunchest supporters ("I do not believe that the word 'persons' here would include corporations," 62 CONG. REC. 2121 (1922) (remarks of Senator Walsh)), it is arguable that corporations are disabled from participating in cooperative associations. However, the language of the statute, as finally enacted, does not expressly exclude the corporate patronage. Courts that have considered the question have not denied Capper-Volstead benefits to an agricultural producer merely because of the form of its organization. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 460-61 (9th Cir. 1966), *reversed on other grounds*, 389 U.S. 384 (1967); *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 45, 49-52 (D.D.C. 1958), *reversed on other grounds*, 362 U.S. 458 (1960). One explanation for the judiciary's tolerance of corporate patronage in the face of negative legislative history is its recognition that it is not so much the nature of the producer, but the nature of agriculture, that justifies the Capper-Volstead exemption. See *Tigner v. Texas*, 310 U.S. 141 (1940). The Fifth Circuit's emphasis on the nature of the producer rather than the nature of production runs counter to precedent.

222. "[T]he characteristics necessary to qualify as an actual 'producer' or 'farmer' cannot be adequately discerned from the legislative history." 1975-2 Trade Cas. ¶ 60,509, at 67,220.



becomes apparent only when assessed against the backdrop of the *causes* of the problems it was enacted to remedy.

While Congress was unaware of the potential for vertical integration in 1922, it was aware of the market adversities confronting producers of agricultural products. In particular, Congress was concerned with the inequality of bargaining power between producers and the "middlemen" who controlled their markets.<sup>223</sup> The inequality was attributable not only to the size and economic concentration of the middlemen,<sup>224</sup> but also to the peculiar characteristics of agriculture itself: perishable products,<sup>225</sup> uninformed decisionmaking<sup>226</sup> and market volatility caused by unrestrained production and characterized by gluts and shortages.<sup>227</sup> Capper-Volstead was enacted in the hope that producers would use their cooperatives horizontally and vertically to sidestep many of the middlemen altogether.<sup>228</sup> Both the producer and the consumer were to benefit.<sup>229</sup>

Although farming and farmers have changed, the vicissitudes of farming do not respect the organizational form of the enterprise. Agricultural products remain perishable, whether the producer is a family farmer or an off-farm integrator. Lack of bargaining power is as harmful to the integrator as to the small farmer. If the market is glutted, the integrator is helpless to stabilize prices. His production commitments are made in advance and he must live with the consequences of his decisionmaking. Nowhere has this

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223. 62 CONG. REC. 2048 (remarks of Senator Kellogg), 2060 (1922) (remarks of Senator Capper); 60 *id.* at 363 (1920) (remarks of Senator Smith).

224. 62 *id.* 2051 (remarks of Senator Kellogg, quoting a speech delivered by President Warren G. Harding), 2216 (1922) (remarks of Senator Townsend); 60 *id.* at 363 (1920) (remarks of Senator Smith).

225. 62 *id.* at 2052 (1922) (remarks of Senator Kellogg).

226. "Marketing is always a group problem. No man can intelligently distribute his product without knowing what the markets will absorb; the amount of that particular commodity grown in this and other countries; competition of other commodities of similar use or character; conditions of transportation; possibilities of storage and credits." *Id.* at 2058-59 (remarks of Senator Capper). See also *id.* at 2060 (remarks of Senator Capper).

227. "More and more it has become evident that the growers must have opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production." *Id.* at 2058 (remarks of Senator Capper). "[Y]ou cannot dump all the production on the country at once and have the farmer receive a good price." *Id.* at 2052 (remarks of Senator Kellogg). See also *id.* at 2262 (remarks of Senator Hitchcock).

228. "The main object of the cooperative association is to get reasonable prices for the farmer, principally through lessening the cost of marketing and selling his products and cutting down the difference between what the farmer receives and what the public finally pays. That is the main object." *Id.* at 2049 (remarks of Senator Kellogg). See also *id.* at 2061 (remarks of Senator Capper).

229. "If by allowing cooperative understandings we can shorten the distance between producer and consumer and eliminate the toll gates on the way the farmer and the consumer will both be benefited." *Id.* at 2216 (remarks of Senator Townsend). See also *id.* at 2049 (remarks of Senator Kellogg), 2257 (remarks of Senator Norris).

been better illustrated than in the broiler industry, where the continuing effects of lack of market information, cyclical production, a highly perishable product, oligopsonistic markets and price volatility remain visible.<sup>230</sup>

The need for horizontal efforts among off-farm integrators can be very real. It should not be presumed, therefore, that off-farm integrators have no entitlement to, or need for, Capper-Volstead privileges. As risk-takers in the production of agricultural commodities, they are subject to the same forces as the small family farmer and the large-scale individual operator. An arbitrary barrier to their participation in cooperative associations undermines congressional purpose.

## 2. How Broad Is Capper-Volstead?

To find support for the proposition that the applicability of Capper-Volstead is to be determined by the amount of the agricultural risk taken rather than by the organizational nature of the producer, one needs only to document Congress' intent that the Act's coverage be broad. "Persons engaged in the production of agricultural products" are entitled to the Act's benefits. These persons may be "farmers, planters, ranchmen, dairymen, nut or fruit growers"—so long as they "produce farm products."<sup>231</sup> Nothing on the face of the statute requires farm ownership, and its legislative history nowhere indicates that land ownership is a precondition to eligibility. In fact, indications are to the contrary, because tenant farmers and sharecroppers were included within the definition of "persons."<sup>232</sup> The sharecropper and the land owner, of course, share the risk of production and marketing, and Congress indicated that it considered both eligible under the Act.<sup>233</sup> Undoubtedly, sharecroppers assume a greater risk, but the inclusion

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230. See text accompanying notes 122-46 *supra*. Roy suggests that the need for integration—vertical and horizontal—is a function of the product and the market structure into which it is sold. For example, he notes that the farm enterprises which have experienced the *least* amount of integration are those whose products (a) have long shelf lives and (b) are subject to federal support programs. E. ROY, *supra* note 12, at 12. This indicates that the *form* of the enterprise is insignificant compared to the nature of the product and its market.

231. 62 CONG. REC. 2052 (1922).

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

Mr. Kellogg. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, *people who produce farm products of all kinds* . . . .

*Id.* (emphasis added).

232. The tenant farmer was considered "our typical American agriculturalist." *Id.* at 2060 (remarks of Senator Capper). See also *id.* at 2258-60 (remarks of Senators Norris, Robinson, and Simmons).

233. See *id.* at 2060, 2258-60 (remarks of Senators Capper, Norris, and Simmons).

of owners suggests that Congress appreciated the role the owner played in supplying or underwriting production inputs, in processing and in marketing. It would be anomalous, therefore, to allow the sharecropper-owner relationship to qualify for Capper-Volstead while excluding the integrator-grower relationship. The contract grower assumes far less production risk than his sharecropper counterpart. Furthermore, the evolution of the Capper-Volstead bill through the two Congresses that considered it displays congressional awareness that agriculture was a complex industry, influenced by myriad forces, whose problems were not susceptible to elementary solutions.

The original exemption, section 6 of the Clayton Act, applied only to nonstock cooperatives.<sup>234</sup> The need for capital flexibility soon became apparent, however, and the earliest precursors<sup>235</sup> of the Capper-Volstead Act expressly provided that capital-stock associations qualified for the exemption if certain dividend restrictions were observed.

During the three years of congressional deliberations on broadening the section 6 exemption,<sup>236</sup> culminating in the Capper-Volstead Act, not only were organizational requirements relaxed, but certain provisions were added to authorize cooperatives to engage in increasingly diversified activities, including processing, preparing for market and handling. By giving a green light to these activities, Congress facilitated the goal of moving commodities from the fields to the consumers' tables without undue intervention from middlemen. Indeed, the final version of the proposed bill gave cooperatives the authority to deal in the products of nonmembers,<sup>237</sup> even

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234. See note 46 *supra*.

235. S. 845, 66th Cong., 1st Sess., *Labor, Agricultural, Dairy, and Horticultural Organizations: Hearings on S. 845 Before a Subcomm. of the Senate Comm. on the Judiciary*, 66th Cong., 2d Sess. 3-4 (1920) [hereinafter cited as *Hearings on S. 845*] (1919); H.R. 7783, 66th Cong., 1st Sess. (1919).

236. See *Collective Bargaining for Farmers: Hearings on H.R. 7783 Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess. (1919) [hereinafter cited as *Hearings on H.R. 7783*]; *Hearings on S. 845, supra* note 235; *Association of Producers of Agricultural Products: Hearings on S. 4344 Before a Subcomm. of the Senate Comm. on the Judiciary*, 66th Cong., 2d Sess. (1920) [hereinafter cited as *Hearings on S. 4344*]; *Authorizing Association of Producers of Agricultural Products: Hearings on H.R. 2373 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. (1921) [hereinafter cited as *Hearings on H.R. 2373*]. H.R. 7783 and S. 845, see text accompanying note 235 *supra*, were introduced in 1919 as amendments to § 6 of the Clayton Act. A few months after the conclusion of hearings on S. 845, H.R. 13931, 66th Cong., 2d Sess. (1920), and S. 4344, 66th Cong., 2d Sess., *Hearings on S. 4344, supra* at 5 (1920), were introduced. Both houses passed versions of these bills. There were, however, certain disagreements related to § 2 of the bill (anti-price enhancement and monopoly), and neither version became law. These bills were reintroduced in the next session, however, and were enacted into law as the Capper-Volstead Act. See generally J. SHIDELAR, *supra* note 41, at 113-14.

237. Restrictions were placed on the amount of nonmember products that could be dealt in

over the objections of some that such power might be subject to abuse.<sup>238</sup>

A further indication of Congress' conscious latitude in Capper-Volstead activities is the important role that it left to the states in determining the nature of the cooperative and in defining the scope of its activities—even though certain state laws then in existence would permit wealthy capitalists to take advantage of the proposed exemption.<sup>239</sup> Furthermore, it was obvious that cooperatives organized under the aegis of various state corporation or cooperative statutes would have diverse forms and different powers.<sup>240</sup> Yet Congress expressly eschewed the fabrication of a monolithic standard to which all cooperative activity had to conform. Instead, a set of broad guidelines was laid down. Within the bounds of these guidelines producers were encouraged to develop the forms of organization and methods of operation that were best suited to the economic conditions confronting them.<sup>241</sup>

It is evident that in creating a means by which producers could respond to the market disabilities confronting them in 1922, Congress had no intention of ossifying the vehicle at the moment of its creation. Congress was well aware that the economy would continue to evolve and that producers would have to adapt if they were to function effectively in an ever-changing arena.<sup>242</sup> Congress did not stop with the Capper-Volstead Act. It went on to create other means of facilitating the adaptation of farming to the twentieth century, most notably the Cooperative Marketing Act of 1926<sup>243</sup> and the Agricultural Marketing Act of 1929.<sup>244</sup>

Congress was fully aware that its broad grant might create the potential for competitive abuses.<sup>245</sup> Nonetheless, it felt the need to give producers latitude in responding to the problems confronting them. Rather than establish inflexible rules that might stifle legitimate and beneficial development

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by a cooperative. "[T]he association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." 7 U.S.C. § 291 (1970).

238. See *Hearings on H.R. 2373*, *supra* note 236, at 27-28; 62 CONG. REC. 2156-57 (1922).

239. *Hearings on H.R. 2373*, *supra* note 236, at 185, 189.

240. 62 CONG. REC. 2120-21 (1922); H.R. REP. NO. 24, *supra* note 42.

241. *Hearings on S. 845*, *supra* note 236, at 56 (statement by Senator Norris).

242. 62 CONG. REC. 2061 (1922) (remarks of Senator Capper); 59 *id.* at 8025 (1919) (remarks of Mr. Hersman).

243. 7 U.S.C. §§ 451-457 (1970). The 1926 Act, with the additional qualifying language emphasized, reads as follows: "Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers . . ." *Id.* (emphasis added). The slight alteration of language suggests that Congress intended to include a broad spectrum of agricultural producers.

244. 12 *id.* §§ 1141b-1141j; see text accompanying notes 54-57, 60 *supra*.

245. See 62 CONG. REC. 2172 (remarks of Senator Brandegee), 2225 (1922) (remarks of Senator Lenroot).

in the organization or operation of the agricultural sector, Congress responded with an expansive grant in order "to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operating in good faith for the benefit of its members might avail themselves of the provisions of this bill."<sup>246</sup> While Congress was aware that its grant was perhaps overbroad, it was confident that, should any abuses come to light, it would have ample power and opportunity to deal with those problems at a later time.<sup>247</sup>

The Fifth Circuit failed to perceive the breadth allowed by the Act when it determined that "Congress carefully limited the benefits of the Act to 'farmers.'" <sup>248</sup> That is not the case. The Act covers the widest range of persons involved in the production (as opposed to mere processing) of agricultural products.<sup>249</sup> The Fifth Circuit, by emphasizing the word "farmer," overly restricts the operation of the Act to the end that the congressional design is threatened with frustration. It is no answer to state "[i]f there are good reasons why broiler integrators should be protected against the general national policy of free competition, then NBMA should present those reasons to Congress."<sup>250</sup> Congress has already indicated that while its inclusion of all producers might be overbroad, they remain covered by the Act until Congress acts to exclude them. By ignoring the congressional framework, the Fifth Circuit usurped a function Congress arguably reserved to itself.<sup>251</sup>

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246. H.R. REP. NO. 24, *supra* note 42, at 1.

247. 62 CONG. REC. 2168 (1922) (remarks of Senator Walsh); 60 *id.* at 363 (1920) (remarks of Senators Simmons and Kellogg).

248. 550 F.2d at 1390.

249. Another example of the intended broad coverage of the Capper-Volstead Act can be found in the treatment accorded Messrs. Armour, Swift and Wilson. The Clayton Act debates manifest undisguised hostility toward the large meat packing trusts. "Why is it that none of these men are wearing stripes in the penitentiary?" 51 CONG. REC. 9546 (1914) (remarks of Representative Quin). Moreover, the meat packing industry had previously been the subject of antitrust sanctions for restrictive trade practices and attempted monopolizations. *Swift & Co. v. United States*, 196 U.S. 375 (1905). Messrs. Armour, Swift and Wilson could hardly have suggested themselves as persons deserving congressional solicitude in the matter of the anti-trust laws. Even with this background, and despite understandable distrust of their motives, Congress expressly contemplated that these gentlemen, if they engaged in the production of agricultural products, could join or form an agricultural cooperative. 62 CONG. REC. 2157 (1922) (remarks of Senator Walsh). Furthermore, a suggestion that Capper-Volstead be limited to those "primarily engaged" in agriculture was debated down. *Hearings on H.R. 2373, supra* note 236, at 195.

250. 550 F.2d at 1391.

251. Other courts have followed this approach when agricultural exemptions are involved: "The social and economic problems related to large-scale corporate farming are more appropriately resolved by debate and committee study in Congress than by adversary proceedings in court. If Congress is troubled by the reasoning . . . , it is free to translate its intent into clearer legislation." *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972).

### 3. Traditional Antitrust Rationale

Whether the rationale behind the antitrust exemption is still wholesome is a matter of current public debate.<sup>252</sup> Even if the rationale is dated and Capper-Volstead does need overhauling, it is incongruous to put agricultural producers with similar characteristics, and whose position vis-a-vis the market is substantially similar, in different categories for antitrust purposes simply because their organizational forms are different.

From an antitrust standpoint, cooperative associations of off-farm integrators may present less of an anticompetitive threat than most associations of on-farm producers. When on-farm producers associate, competition occurs only in the production stage. After the production stage is completed, handling, processing, marketing and distribution functions are administered cooperatively. With off-farm integrators, however, competition is preserved throughout many levels. In the case of NBMA, for example, the various integrator members compete at the input, production, handling, processing and distribution stages. The only area in which they purport<sup>253</sup> to work cooperatively is in marketing. Because of multilevel competition in the vertically integrated enterprise, the incentives for innovation, optimal production scales and cost controls are broader and more beneficial.<sup>254</sup>

Whatever the Fifth Circuit's reasons for excluding "agribusiness" from eligibility in a Capper-Volstead cooperative, it certainly cannot be that off-farm integrators are immune to the caprice of the marketplace. The

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252. See, e.g., *Food Price Investigation*, *supra* note 163, at 8 (testimony of T. Kauper, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice); *Family Farm Act Hearings*, *supra* note 8, at 14 (remarks of Representative McClory); L. KRAVITZ, WHO'S MINDING THE COOP? A REPORT ON FARMER CONTROL OF FARMER COOPERATIVES (Agribusiness Accountability Project, 1974); U.S. DEP'T OF JUSTICE, *supra* note 52, at 10-13; Statement of Donald I. Baker, *supra* note 52, at 16-18.

253. The specific purpose of NBMA was marketing, and the function of the association was largely limited to dissemination of market information as provided in 7 U.S.C. § 455 (1970).

254. Anticompetitive behavior is most likely to result from horizontal rather than vertical integration. The former "may reduce the number of competitors" while the latter "may add to competition." E. ROY, *supra* note 12, at 19. In any event, "If vertical integration is based on excessive horizontal integration, it may be wiser for society to attack the horizontal combinations rather than to focus solely on the vertical." *Id.* (emphasis added). This is especially true when the vertical integration is achieved through contract farming. *Id.* It is therefore unwise to presume that a producer is anticompetitive just because it is vertically integrated. The inquiry should be leveled at the market power of the horizontally integrated association of producers and whether this market power is exercised in conjunction with true "non-farmers," *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 457 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939), or by use of coercive and predatory practices, *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 388 F.2d 789 (3d Cir. 1967); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1967), *rev'd on other grounds*, 389 U.S. 384 (1967); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965).

enunciated purposes of Capper-Volstead can be as applicable to a vertically integrated enterprise as to the on-farm producer. Furthermore, the Capper-Volstead benefits sought by vertically integrated firms probably entail less anticompetitive potential than those sought by on-farm producers. Off-farm integrators, as long as they take substantial risks in the production area, should be allowed to avail themselves of the benefits of cooperation. A means must therefore be devised to control access to the benefits of the Capper-Volstead Act in order to exclude undeserving entities and to maintain the delicate balance between the antitrust laws and the special agricultural exemption.

*C. A Standard for Determining Which Off-Farm Integrators Shall Be Allowed To Form or Join Agricultural Cooperatives*

In enacting the Capper-Volstead Act, Congress made a determination that, for antitrust purposes, agriculture was fundamentally different from other capitalistic enterprises.<sup>255</sup> This difference, attributable to special circumstances and hazards, legitimized a "price and production policy . . . different from that which underlies the demands made upon industry and commerce by anti-trust laws."<sup>256</sup> Depending on the production risks they assume, off-farm integrators may be no less deserving of privileged treatment than family farmers. It is not the "ownership or operation of a farm" that justifies special treatment, but the nature of agriculture in general. In distinguishing eligible producers from ineligible producers, the principal focus should be on determining whether, in a given situation, the special circumstances of agriculture that first necessitated passage of remedial legislation exist.

Agriculture, because of its singular nature, has been afforded different treatment not only by the antitrust laws, but by the Internal Revenue Code, the Interstate Commerce Act<sup>257</sup> and the Fair Labor Standards Act<sup>258</sup> as well.

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255. As the late Lyman S. Hulbert wrote,

Agriculture is fundamentally different from industry. The number engaged in agriculture or any branch thereof, the distances which separate them, the conditions incident to the production of agricultural products, inherent difficulties involved in controlling acreage, the variability of production from climatic causes—the caprice of the seasons, and the number of agricultural products that may be substituted for each other seem to afford reasonable bases for classification.

L. HULBERT, LEGAL PHASES OF FARMER COOPERATIVES 177 (FCS Bull. No. 10, 1958).

256. *Tigner v. Texas*, 310 U.S. 141, 146 (1940) (Frankfurter, J.). "Since Connolly's case [*Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)] was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy . . ." 310 U.S. at 145.

257. 49 U.S.C. §§ 301-327 (1970).

258. 29 *id.* §§ 201-219.

While these statutory schemes might single out agriculture because of some policy determinations unrelated to those embodied in Capper-Volstead, they nonetheless are affected with a common "raison d'être"<sup>259</sup> germane to the special needs of agriculture in an imperfectly competitive economy. It is instructive, therefore, to investigate how courts have approached the task of determining whether off-farm integrators qualify as "producers" for the purposes of these kindred statutory schemes.

Section 521 of the Internal Revenue Code<sup>260</sup> exempts farmers' cooperatives from federal income taxation so long as they are operated for the benefit of "members" or other "producers." The term "producer" has been defined as one who "as an owner or tenant . . . bears the risks of production, cultivates, operates, or manages a farm for gain or profit—in short, [one who] is engaged in the trade or business of farming."<sup>261</sup> The cases and revenue rulings that have considered the definition of "producer" indicate that the key factor is the entrepreneur's exposure to the risk of profit fluctuation, which is a risk caused by weather, disease, market demand or similar factors.

*Farmers Co-Operative Creamery v. Commissioner*<sup>262</sup> held that the farm owner who operates his farm through tenants on a crop-sharing basis qualified as a "producer" because he "risks his capital, furnishes seed and takes his chances on profits in much the same manner as he would were he to hire the work done for wages."<sup>263</sup>

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259. Cf. *Northcross v. Memphis Bd. of Education*, 412 U.S. 427, 428 (1973) (provisions of Emergency School Aid Act of 1972 and Civil Rights Act of 1964 should be given same construction due to common *raison d'être*). Without fear of over-generalization, it is safe to say that there is an overall national agricultural policy which is consistently reflected in the body of laws: antitrust, securities, corporate, commercial, labor, tax, environmental and others. While these laws deal with diverse topics, their substance vis-a-vis agriculture is governed by the special circumstances of agriculture. This common thread imbues policies behind one set of laws somewhat probative of the policies behind other sets of laws. Caution should be exercised to not misjudge the purpose of one act by applying the totally different standards adopted by another, *FTC v. Bunte Bros.*, 312 U.S. 349, 353 (1941); *United States v. Stewart*, 311 U.S. 60, 69 (1940), but neither should the obvious interfacings of congressional intent be ignored. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 544-45 (1940).

260. I.R.C. § 521. In particular, § 521 exempts farmers' cooperatives from income tax to the extent they are "farmers, fruit growers or like associations organized and operated on a cooperative basis . . . for the purpose," *inter alia*, "of marketing the products of members or other producers." *Id.* § 521(a), (b). Section 521 seemingly adopts the Capper-Volstead meaning of cooperative. See *Treas. Reg. § 1.521-1(a)(1)* (1958). However, the statute does not expressly define "farmer" or "producer."

261. Rev. Rul. 67-422, 1967-2 C.B. 217, 218 (emphasis added).

262. 21 B.T.A. 265 (1930), *acq.* 1957-2 C.B. 4.

263. *Id.* at 268; *accord*, *Dr. P. Phillips Coop. v. Commissioner*, 17 T.C. 1002, 1009 (1951) (test is whether taxpayer "might fairly be regarded as having taken the risks and responsibilities of the owner of a growing crop"). Various revenue rulings have also embraced the risk test. Rev. Rul. 67-422, *supra* note 261, specified that a producer "bears the risk of production." It illustrates the point by distinguishing between persons receiving percentage rentals and those



The risk test has also been adopted for determining who is a "farmer" for purposes of the special income reporting regulations promulgated under section 471 of the Internal Revenue Code.<sup>264</sup> In defining the word "farm," the regulations provide: "As used in this section, the term 'farm' embraces the farm in the ordinarily accepted sense . . . ."<sup>265</sup> Three cases involving off-farm integrators have afforded the courts the opportunity to determine what the "ordinarily accepted sense" is.

In *United States v. Chemell*,<sup>266</sup> the government contended that "farmer," in its ordinary sense, referred only to "persons engaged in tilling the soil, and in raising and marketing crops, dairy products and livestock as a part of the farm economy."<sup>267</sup> Integrated production (using growing contracts), by contrast, was but an incident of farming, "a commercial and industrial activity by mechanical means,"<sup>268</sup> especially when the taxpayer-integrators "did not own or lease any farm lands."<sup>269</sup> Rejecting the government's argument, the court ruled that lack of land ownership was inconsequential. Farmer status was conferred by significant participation in the various stages of the production process.<sup>270</sup>

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receiving fixed rentals. "[A] person who receives a fixed rental or other fixed compensation (without reference to production) is not a producer." *Id.* at 218. But, "A person who receives a rental (either in cash or in kind) which is based upon farm production is engaged in the trade or business of farming, and hence is a producer . . . ." *Id.*

Rev. Rul. 72-589, 1972-2 C.B. 282, reaffirmed and amplified Rev. Rul. 67-422. Focusing on a similar problem, Rev. Rul. 72-589 emphasized the importance of bearing "the risks and responsibilities of a growing crop."

While not explicitly mentioning risk, Rev. Rul. 58-483, 1958-2 C.B. 277, ruled that when a feed dealer furnishes poultry and feed to a grower, who then raises the poultry and returns it to the dealer for marketing through a farmers' cooperative association of which both are patrons, both the feed dealer and the grower are producers. The implicit ground for this ruling is the dealer's entrepreneurial risk in the transaction.

I.R.C. § 175 allows taxpayers "engaged in the business of farming" to deduct soil and water conservation expenditures as current expenses rather than capital items. Treas. Reg. 1.175-3 (1957) states that a taxpayer is "engaged in the business of farming" when he "cultivates, operates or manages a farm for gain or profit." The regulation suggests a *risk* element as a determining criterion. Thus, one who leases his farmland and receives rental (in cash or in kind) which is based upon production is held to be engaged in the business of farming. One who receives a set rental irrespective of production is not unless he participates materially in the actual management of the farm. *Id.* What distinguishes the farmer from the non-farmer, then, is the element of *risk* associated with the tying of rental to production.

264. Treas. Reg. § 1.471-6(a) (1958) provides: "A farmer may make his return upon an inventory method instead of the cash receipts and disbursements method. It is optional with the taxpayer which of these methods of accounting is used . . . ."

265. *Id.* § 1.61-4(d) (1957). Furthermore, "farmers" include all "individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants." *Id.*

266. 243 F.2d 944 (5th Cir. 1957).

267. *Id.* at 946.

268. *Id.*

269. *Id.* at 947.

270. The maintaining of a flock of hens producing eggs to be hatched into chicks and the growing of feed are agricultural pursuits and are parts of an integrated operation.

The *Chemell* holding has been reinforced by the decision in *Maple Leaf Farms v. Commissioner*.<sup>271</sup> As in *Chemell*, the issue was whether the off-farm integrator was a "farmer."<sup>272</sup> The Tax Court concluded that it was for two reasons. First, the integrator "participated to a significant degree in the growing process"<sup>273</sup> because it provided feed, medicines and vaccines, retained title to the commodity and used fieldmen to supervise the grow-out.<sup>274</sup> Secondly, the integrator "bore a substantial risk of loss,"<sup>275</sup> including the risk of losing the commodity produced<sup>276</sup> and the risk of market uncertainty.<sup>277</sup> While the integrator did not assume the total risk of loss, "on balance . . . the petitioner assumed a risk of loss from the growing process of sufficient magnitude to satisfy this element of the 'farmer' formula. One need not bear *all* the risks of loss to be considered a farmer."<sup>278</sup>

Finally, *Garth v. Commissioner*<sup>279</sup> involved a large off-farm integrator who used contract growers. The government did not dispute that Garth's operations constituted farming. Pointing to the size and scope of the operations, however, the government argued that Garth was not a farmer "in the ordinarily accepted sense."<sup>280</sup> The court ruled that farming was farming, and that the size and scope of the operation was irrelevant as long as its nature was agricultural.<sup>281</sup>

Thus, on the basis of decisions and rulings under the tax laws and regulations, it is clear that a "farmer" is defined by: (1) The degree of involvement in the production process, regardless of the size and scope of

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The government submits that these portions of the taxpayers' activities were minor and incidental. The taxpayers insist that their activities in connection with breeding and raising of their own laying flocks were essential and were a major and important part of the chick hatching business. We think the evidence sustained the taxpayers' position.

*Id.* at 948-49.

271. 64 T.C. 438 (1975), *acq.* 1975-47 I.R.B. 6.

272. *Id.* at 447.

273. *Id.* at 448.

274. *Id.* at 448-49.

275. *Id.* at 448.

276. "The unforeseen loss of a flock is the major risk in poultry raising . . ." *Id.* at 450.

277. Another risk assumed by the petitioner involved market uncertainties. Petitioner could have been caught in the middle of rising or falling prices for the ducklings, feed, and medication it purchased and the ducks it sold, as its debits and credits to the growers were unaffected by such changes. By way of contrast, the grower knew in advance what the measure of debits and credits to his account would be. That spread was locked up and, indeed, the lack of risk thus effectuated was a primary reason for the grower to participate.

*Id.* at 450-51.

278. *Id.* at 451.

279. 56 T.C. 610, *appeal dismissed*, [1971] 6 FED. TAXES (P-H) ¶ 61,000, at 61,004 (5th Cir. 1971).

280. *Id.* at 619.

281. *Id.*

his overall operation, and (2) the assumption of risk of loss of the agricultural product itself.

A case under the Interstate Commerce Act<sup>282</sup> was decided on similar grounds. The Interstate Commerce Act exempts from regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act."<sup>283</sup> The Agricultural Marketing Act<sup>284</sup> defines the term "cooperative association" to mean associations of "farmers."<sup>285</sup> Whether off-farm integrators are "farmers" for the purposes of the Agricultural Marketing Act and the Interstate Commerce Act was addressed in *Agricultural Transportation Association of Texas v. United States*.<sup>286</sup>

The Association hauled the products of its members, some of whom were integrators whose supply came from contract growers. Claiming that the products produced by contract growers were not the products of the members, the Interstate Commerce Commission (ICC) ordered the Association to cease and desist from its transportation of agricultural commodities in interstate commerce for compensation on the theory that one-half of the Association's revenues were generated from transportation services done for nonmembers. At the hearing stage, the ICC held broadly that "actual ownership or operation of farms is a prerequisite to qualify an individual organization as a farmer."<sup>287</sup> The reviewing court, however, disagreed and ruled that contract growing did not disqualify an integrator from being a farmer as long as the integrator is substantially involved in the various stages of agricultural production, including the growout stage, and assumes the risk of loss of the product.<sup>288</sup>

Like the Internal Revenue Code and Interstate Commerce Act, the Fair Labor Standards Act (FLSA)<sup>289</sup> singles out agriculture for special treatment. That Act sets minimum wage and maximum hour standards for most

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282. 49 U.S.C. §§ 301-327 (1970).

283. *Id.* § 303(b)(5).

284. 12 *id.* § 1141b-1141j.

285. The full definition reads:

[A]ny association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and . . . any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services . . . .

*Id.* § 1141(j)(a).

286. 274 F. Supp. 528 (N.D. Tex. 1967).

287. *Id.* at 532.

288. The processor contracting with small farmers for the production of raw materials which furnishes seed and fertilizer, supplies financing, closely supervises the actual growing of crops or raising of cattle, assumes the risk of loss, and which is the legal owner of the crop or head of cattle, is entitled to qualify as a farmer. . . . We distinguish this processor from the one which contracts merely to get a "price." The latter is little more than a promoter.

*Id.* at 536.

289. 29 U.S.C. §§ 201-219 (1970).

employees. "[E]mployee[s] employed in agriculture,"<sup>290</sup> however, are exempted from the Act's coverage. Numerous cases have arisen under FLSA in which the central issue has been whether employees of off-farm integrators are covered by the Act.<sup>291</sup> The NLRB has consistently taken the position, as has the Justice Department in the Chicken Case, that the use of contract growers renders the integrator a nonfarmer.<sup>292</sup> "The argument is that the fact that respondent uses the independent growers destroys its claim to having raised the bird; that respondent is more akin to the purchaser of the bird."<sup>293</sup>

In a bevy of FLSA cases courts have ruled that integrators are "farmers" for purposes of the wage and hour exemptions. Central to their decisions were findings that the integrator retained title to the agricultural product throughout the production stage,<sup>294</sup> was substantially involved in the production process since it supplied most, if not all, of the production inputs and decisionmaking,<sup>295</sup> bore the risk of loss of the agricultural product and production inputs at all times,<sup>296</sup> and provided production initiatives that the contract growers would never have provided on their own.<sup>297</sup> These cases acknowledged the fact that the role of the contract grower, while integral to production, was dwarfed by the overall production activities of the integrators.

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290. *Id.* § 213(a)(6). "Agriculture" is defined in § 3(f) of the Act: "'Agriculture' includes farming in all its branches . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." *Id.* § 203(f).

291. *McElrath Poultry Co. v. NLRB*, 494 F.2d 518 (5th Cir. 1974); *Abbott Farms, Inc. v. NLRB*, 487 F.2d 904 (5th Cir. 1973); *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972); *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969); *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966); *Nix v. Farmers Mut. Exch.*, 218 F.2d 642 (5th Cir. 1955); *Miller Hatcheries, Inc. v. Boyer*, 131 F.2d 283 (8th Cir. 1942); *Mitchell v. Georgia Broiler Supply Co.*, 186 F. Supp. 341 (N.D. Ga. 1960).

292. See *McElrath Poultry Co. v. NLRB*, 494 F.2d 518 (5th Cir. 1974); *Abbott Farms, Inc. v. NLRB*, 487 F.2d 904 (5th Cir. 1973); *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972); *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969).

293. *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1030 (5th Cir. 1969).

294. *Abbott Farms, Inc. v. NLRB*, 487 F.2d 904, 904 (5th Cir. 1973); *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20, 20 (9th Cir. 1972); *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1033 (5th Cir. 1969); *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255, 257, 259-61 (8th Cir. 1966); *Mitchell v. Georgia Broiler Supply, Inc.*, 186 F. Supp. 341, 345 (N.D. Ga. 1960).

295. *Abbott Farms, Inc. v. NLRB*, 487 F.2d 904, 904 (5th Cir. 1973); *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20, 20 (9th Cir. 1972); *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1030-32 (5th Cir. 1969); *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255, 257, 260-61 (8th Cir. 1966); *Nix v. Farmers Mut. Exch.*, 218 F.2d 642, 644 (5th Cir. 1955); *Miller Hatcheries, Inc. v. Boyer*, 131 F.2d 283, 285 (8th Cir. 1942); *Mitchell v. Georgia Broiler Supply, Inc.*, 186 F. Supp. 341, 345 (N.D. Ga. 1960).

296. *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1030 (5th Cir. 1969); *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255, 257, 259, 261 (8th Cir. 1966).

297. *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1031 (5th Cir. 1969); *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255, 258, 260 (8th Cir. 1966).

The authority of these cases may have been weakened by the recent decision of the Supreme Court in *Bayside Enterprises, Inc. v. NLRB*.<sup>298</sup> In *Bayside*, a vertically integrated poultry producer refused to bargain with a union representing its truckdrivers. The drivers transported poultry feed from a company owned feed mill to the farms of contract growers. Section 2(3) of the National Labor Relations Act (NLRA)<sup>299</sup> exempts "agricultural laborers" from the Act. The meaning of "agricultural laborer," however, is tied to the meaning of "agriculture" and "farmer" under the FLSA.<sup>300</sup> Thus, *Bayside* indirectly presented the issue passed upon by the courts in the FLSA cases: what is a "farmer" for the purposes of a federal labor law exemption? After a hearing, the NLRB ruled that the truck drivers were not agricultural laborers and, hence, not exempt from the Act.<sup>301</sup> The Court of Appeals for the First Circuit affirmed.<sup>302</sup>

Mr. Justice Stevens, speaking for a unanimous Supreme Court, rejected *Bayside's* contention that its truck drivers were agricultural laborers. The Court determined that the drivers' status could be ascertained by the "character of the employer's activities."<sup>303</sup> Rather than looking at *Bayside's* activities as a single, vertically integrated agricultural operation, however, the Court divided *Bayside's* production system into its component parts.<sup>304</sup> The transportation of feed by the drivers from feed mill to contract grower was one of these components. The Court, viewing this activity in isolation from the rest of the system, found it to be nonagricultural and held for the NLRB.<sup>305</sup>

Central to the decision is the Court's subdivision of *Bayside's* business into agricultural and nonagricultural components, despite the violence thereby done to the concept of vertical integration. The very purpose of vertical integration is to coordinate the otherwise disjointed components of a production system.<sup>306</sup> When that system is geared toward the production of a product of a specific character, such as an agricultural commodity, it is arguable that the character of its component parts should be colored by the ultimate goal of the system. Otherwise, any vertically integrated business can be picked apart component by component, with each component having

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298. 429 U.S. 298 (1977).

299. 29 U.S.C. § 152(3) (1970).

300. *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. at 300; 29 U.S.C. § 203(f) (1970).

301. 216 N.L.R.B. 502 (1975).

302. 527 F.2d 436 (1st Cir. 1975).

303. 429 U.S. at 301.

304. *Id.* at 301-02.

305. *Id.* at 302-04.

306. See text accompanying note 26 *supra*.

a different legal status. This approach not only refuses to recognize vertical integration for what it is, but also threatens to undermine its benefits.

*Bayside* should be restricted to cases arising under the NLRA. Both the Capper-Volstead Act and the Cooperative Marketing Act of 1926 sanction vertical integration.<sup>307</sup> It would be anomalous indeed for the Supreme Court to decide the Chicken Case on the basis of a component by component approach when Congress has encouraged the combination of production stages into a vertically integrated system. In the context of Capper-Volstead, the best guide for distinguishing farmers from nonfarmers remains the risk of loss test. Risk is the basis of the Capper-Volstead legislative classification, and even if previous FLSA cases do not retain vitality after *Bayside* as to FLSA questions, they nonetheless should remain authoritative for Capper-Volstead purposes.

If the remedial goals of cooperation are to be safeguarded against exploitation, and if the anticompetitive evils of cooperation are to be held in check, then a workable means of distinguishing farmers from nonfarmers must be formulated. In perfecting a standard, utmost attention must be given to the realities of commercial agriculture that inspired the lawmakers to treat it specially. Failure to do so is likely to produce results that contravene the underlying purposes of cooperative legislation and to affect adversely agricultural growth and modernization. This is precisely the mistake made by the Fifth Circuit in the Chicken Case, where the ultimate test of eligibility is economically meaningless in view of the many ways in which it can be circumvented.

Based on the legislative history of the cooperative acts and kindred statutes in the labor, tax and interstate commerce areas, a preferred test for determining eligibility would take into account the following criteria:

1. The degree of direct involvement by the producer in the production of the commodity, including supply of inputs and production adjuncts. If the involvement in the production process is partially contracted out to growers, the degree of direct or indirect supervisory control over the growout stage should be assessed.

2. The degree to which the risk of losing the value of the production is borne by the integrator. While the risk may be shared in some degree with a tenant, sharecropper or grower, the greater share of risk should be borne by the integrator. The prime indicator of risk is financial responsibility for inputs and adjuncts and ownership of the commodity throughout the production process.

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307. See text accompanying notes 48-57 *supra*.

The application of this two-fold test should be sufficient to determine whether the off-farm integrator stands in sufficient relation to the forces of agriculture to justify his access to the benefits of cooperation.

### III. CONCLUSION

The growth and development of vertically integrated enterprises have exerted a positive influence on American agriculture. Better products produced by advanced technology at lower cost have benefited both the producing and consuming sectors of the economy. Nowhere has the track record been as impressive as in the broiler industry.

At the same time, off-farm integrators have discovered that the efficiencies of vertical integration are not always sufficient to insure the viability of the enterprise. Without horizontal power and coordination, the perishability of the product, the volatility of price, the ever-present inscrutability of the market and the lack of bargaining power in oligopsonistic markets adversely affect the operations of family farmers and off-farm integrators alike. The tendency, however, has been to presume that off-farm integrators are excluded from the benefits of cooperation. This presumption, if perpetuated, might precipitate costly consequences, the tab for which eventually will be borne by the consumer.

The plea of this article is one for reflection, analysis, de-stereotyping and abstention from presumptions founded on unwarranted prejudices. The Chicken Case has cast a pall over the continued growth of vertically integrated enterprises in all fields of agriculture, even though the farm ownership or operation criterion used by the Fifth Circuit is easily circumvented—at sacrifice of the independence of thousands of contract growers who participate in the production process. Furthermore, the Fifth Circuit ruling tends to insulate, temporarily anyway, large-scale producers and producer-based cooperatives from competition. Many of these producers share the same size and organizational attributes manifested by off-farm enterprises.

The Fifth Circuit's solution comports with neither congressional intent nor prudent antitrust policy. The very premise upon which the Capper-Volstead rationale is founded is the extraordinarily risky nature of farming. Land ownership, in this day of extensive land leasing and tenantry, has little bearing on the risks of the marketplace. It is senseless to require modern farmers to own land when it is cheaper to lease it. It is likewise unwise to require a producer to "operate a farm" when the day to day administrative tedium of running a farm can be contracted out to efficient growers.

One hopes that the Supreme Court will restore to the broiler industry—and integrated agriculture in general—the incentives to build a better mousetrap. In the meantime, the Justice Department and the Department of Agriculture should take a hard look at the Fifth Circuit decision for what it really is and devise a more realistic approach to the enhancement of competition and the development of more efficient production systems.