

The National Agricultural  
Law Center



University of Arkansas  
System Division of Agriculture

---

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

## **Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption**

by

Alice Schumacher Horneber

Originally published in SOUTH DAKOTA LAW REVIEW  
27 S. D. L. REV. 476 (1982)

[www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org)

## AGRICULTURAL COOPERATIVES: GAIN OF MARKET POWER AND THE ANTITRUST EXEMPTION

*Agricultural cooperatives are neither completely subject to nor absolutely immune from antitrust proscriptions. With the passage of legislation in the early 1900's, Congress granted agricultural cooperatives a partial exemption from the antitrust laws. The United States Supreme Court has held that predatory trade practices fall outside the exemption. The Supreme Court has not, however, addressed whether the gain of market power, absent predatory conduct, is also outside the exemption. This comment explores that issue. It focuses on a recent circuit court decision which sanctioned unlimited formation, growth, and operation of powerful agricultural cooperatives. The comment concludes by evaluating the effect of this holding on two subsequent decisions.*

### INTRODUCTION

“Today agricultural cooperatives are as much a part of farming as sweat and overalls.”<sup>1</sup> More than five out of six farmers in the United States own, operate, and use cooperatives.<sup>2</sup> The Capper-Volstead Act,<sup>3</sup> federal legislation passed in 1922, is the single, most important reason cooperatives are so predominant in today's agricultural community.<sup>4</sup> By providing a limited exemption from federal antitrust laws, the Act has enabled production and marketing systems not yet conceived in 1922 to exert substantial power in certain sectors of the agricultural economy.<sup>5</sup>

The milk and dairy products industry graphically illustrates how agri-

---

1. This observation was first made by the author of Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 341 (1975). This comment uses the terms “agricultural cooperative”, “agricultural association”, “farmers' association”, and “farmers' organization” interchangeably.

Statistics on agricultural cooperatives are generally presented according to a cooperative's major function, or classification. These classifications include marketing, farm supply, and related service cooperatives. See, e.g., *National Month Opportunity to Focus on Self Help Aspects of Cooperatives*, FARMER COOPERATIVES, Oct. 1981, at 4, 5. Marketing cooperatives are further classified as handling marketing cooperatives and bargaining marketing cooperatives. The former receive the raw product from members at a physical location and, by washing, boxing, drying, or processing, change or increase the value of the product. The latter perform more as a realtor does, representing the seller in negotiations with buyers. Lemon, *The Capper-Volstead Act—Will It Ever Grow Up?* 22 AD. L. REV. 443, 447 (1970). This comment focuses on the market power gained by handling marketing cooperatives.

2. FARMER COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, INFORMATION 100, LEGAL PHASES OF FARMER COOPERATIVES 2 (1976). In the year 1979, there were 244 agricultural cooperatives with headquarters in South Dakota. This included a total membership of 169,217. *Farmer Cooperative '79 Business Reaches Record \$56.3 Billion*, FARMER COOPERATIVES, June 1981, at 10, 11.

3. 7 U.S.C. §§ 291-92 (1976).

4. The Capper-Volstead Act is commonly hailed as agriculture's Magna Charta. M. SCHAARS, COOPERATIVES, PRINCIPLES AND PRACTICES 94-95 (2d rev. 1970-71).

5. It is argued the market power exerted today by agricultural cooperatives is, in reality, the result of two factors. These factors include the existence of a degree of antitrust immunity for the cooperative form of business and the existence of regulation of commodity prices and marketing by the federal government. This comment addresses only the antitrust immunity issue. For a discussion of the effects of both factors on marketing in the dairy industry, see AM. ENTER. INST. FOR

cultural cooperatives formed under the Capper-Volstead exemptions exert market power. At the end of calendar year 1979, 495 dairy cooperatives handled a net volume of \$11,592,363,000<sup>6</sup> or sixty-eight percent<sup>7</sup> of the entire milk and dairy products market. Because agricultural cooperatives, such as those found in the milk and dairy products industry, can achieve substantial market power without employing any reprehensible conduct, the present need for Capper-Volstead antitrust exemptions has been questioned.<sup>8</sup>

In *Fairdale Farms, Inc. v. Yankee Milk, Inc.*<sup>9</sup> the United States Court of Appeals for the Second Circuit recently had an opportunity to evaluate the Capper-Volstead exemptions in terms of the formation of a dairy cooperative and that cooperative's subsequent achievement of marketing power. The plaintiffs in *Fairdale Farms* contended, among other things, that agricultural cooperatives, once formed, should be treated like other business corporations under the federal antitrust laws.<sup>10</sup> The court rejected this argument and held that agricultural cooperatives still enjoy those antitrust exemptions first given them in 1922.<sup>11</sup>

The Second Circuit's decision in *Fairdale Farms* is the focus of this comment. It begins with a look at the historical background of agricultural cooperatives and their treatment under the antitrust laws. The comment then outlines the events giving rise to the Second Circuit appeal. It also discusses the factors the court in *Fairdale Farms* relied upon in reaching its decision. Finally, the comment explores the effect of the *Fairdale Farms* holding on two subsequent decisions.

## HISTORY OF AGRICULTURAL COOPERATIVES

### *The Advent of Antitrust Exemptions*

The first American agricultural cooperatives were organized prior to the Civil War.<sup>12</sup> Indeed, histories of the movement were already available in the nineteenth century.<sup>13</sup> State and federal antitrust laws, however, inhibited the growth of agricultural cooperatives.<sup>14</sup> As a result, agricultural coop-

PUB. POL'Y RESEARCH, FORD AD. PAPERS ON REGULATORY REFORM, FEDERAL MILK MARKETING ORDERS AND PRICE SUPPORTS (P. MacAvoy ed. 1977). See also *infra* notes 48 and 152.

6. AGRICULTURAL COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, COOPERATIVE INFORMATION REP. 1, SECTION 27, FARMER COOPERATIVE STATISTICS 1979, at 5 (1981).

7. Letter from James R. Baarda, Senior Agricultural Economist with the Agricultural Cooperative Service of the U.S. Dep't of Agriculture, to Alice Horneber (Jan. 28, 1982) (discussing statistics of agricultural cooperatives).

8. See *infra* notes 137-42 and accompanying text.

9. 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 98 (1981).

10. See *id.* at 1040.

11. See *id.* at 1045.

12. See generally J. KNAPP, THE RISE OF AMERICAN COOPERATIVE ENTERPRISE: 1620-1920, at 5-95 (1969), which traces cooperative enterprise from its informal beginnings in early colonial days down to the time when it was fairly well rooted as a form of business in 1896.

13. For a list of authorities on the subject of the historical aspects of agricultural cooperatives, see LEGAL PHASES OF FARMER COOPERATIVES, *supra* note 2, at 19-20 n.47.

14. By 1900, nearly all states had enacted statutes or constitutional provisions prohibiting monopolies, trusts, and restraints of commerce. Some farm associations were convicted under these

eratives, until the twentieth century, remained small, local organizations with little power to bargain effectively on behalf of their members.<sup>15</sup>

Around the turn of the century, growers in the expanding California fruit industry discovered the advantages of collectively processing and marketing their perishable fruit. Large-scale, single commodity cooperatives quickly assumed a dominant role in the fruit industry.<sup>16</sup> During the post-World War I agricultural depression, the concept of large-scale, cooperative commodity marketing also began to spread to other parts of the country.<sup>17</sup> Many state legislatures responded by enacting enabling statutes excepting organizations of this type from state antitrust laws.<sup>18</sup> Members of Congress also began to acknowledge the need to shelter collective action by farmers from federal antitrust proscriptions.<sup>19</sup>

Prior to 1914, the Sherman Act,<sup>20</sup> which prohibits activities culminating in restraint of trade or monopolization, served as the strongest federal deterrent to the development of large agricultural cooperatives. In that year, Congress took a major step toward exempting agricultural cooperatives from Sherman Act regulation. It enacted section six of the Clayton Act<sup>21</sup> which explicitly permitted the existence and operation of agricultural organiza-

---

laws while others were found in violation of common-law antitrust principles. Note, *supra* note 1, at 341 n.3. For a summary of state enforcement prior to 1914, see LEGAL PHASES OF FARMER COOPERATIVES, *supra* note 2, at 268-75.

The Sherman Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-2 (1976)), was enacted in 1890. Although Senator Sherman did not believe his bill applied to agricultural cooperatives, he offered an amendment to the Sherman Act that would have exempted agricultural cooperatives from its proscriptions. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1041 (2d Cir. 1980). The amendment stated: "Provided, That this act shall not be construed to apply . . . to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products." Without explanation, the amendment was deleted from the bill as enacted. 21 CONG. REC. 2726 (1890). The Supreme Court interpreted the Sherman Act as a strong deterrent to the development of large agricultural cooperatives. See *Loewe v. Laylor*, 208 U.S. 274, 301 (1908).

15. See *Maryland and Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 464 (1960).

16. See, e.g., *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962).

17. J. KNAPP, *THE ADVANCE OF AMERICAN COOPERATIVE ENTERPRISE: 1920-1945*, at 7-12 (1973).

18. See generally *Tigner v. Texas*, 310 U.S. 141, 145-47 (1940) (state antitrust act exempting agricultural activities from the operation of its criminal provisions held constitutional).

Between 1918 and 1925, farmers were able to get almost every state to pass legislation allowing the formation of capital stock cooperative corporations. NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, U.S. DEPT OF JUSTICE, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 255 (1979). South Dakota law expressly provides for the formation and operation of cooperatives. S.D.C.L. chs. 47-15 through 47-20 (1967 & Supp. 1981).

19. In 1921, a number of Republican and Democratic Senators from the farm states pledged themselves to support legislation necessary for the welfare of agriculture. J. KNAPP, *supra* note 17, at 21.

20. The relevant portions of the Sherman Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890), are currently located at 15 U.S.C. §§ 1-2 (1976). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

21. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 17 (1976)).

tions. These organizations were immune from attack as illegal combinations or conspiracies so long as they pursued their legitimate objectives. The Act, however, exempted only non-capital-stock agricultural cooperatives.<sup>22</sup> In addition, courts did not interpret this section as enabling agricultural cooperatives to adopt methods of conducting their operations denied to other business organizations.<sup>23</sup>

Because section six of the Clayton Act failed to satisfactorily exempt agricultural cooperatives from the federal antitrust laws, Congress passed the Capper-Volstead Act<sup>24</sup> in 1922. This Act provides persons engaged in the production of agricultural products with limited antitrust immunity by permitting them to act collectively in processing, preparing, handling, and marketing their products. It also permits associations of such persons to have marketing agencies in common.<sup>25</sup> Finally, the Act gives the Secretary of Agriculture authority to direct agricultural cooperatives to cease and desist any monopolization in the form of undue price enhancement.<sup>26</sup>

### *Limits of Antitrust Exemptions*

The first major case interpreting the immunity of agricultural cooperatives from the antitrust laws under the Capper-Volstead Act was *United States v. Borden Co.*<sup>27</sup> In *Borden*, the United States Supreme Court refused an

22. 15 U.S.C. § 17 (1976) reads:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

23. See LEGAL PHASES OF FARMER COOPERATIVES, *supra* note 2, at 290-92 and the cases cited at nn.105-108.

24. Capper-Volstead Act, ch. 57, §§ 1-2, 42 Stat. 388 (1922) (current version at 7 U.S.C. §§ 291-92 (1976)).

25. 7 U.S.C. § 291 (1976) provides:

Persons engaged in the production of agricultural products . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .

26. 7 U.S.C. § 292 (1976) provides:

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, . . . requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization restraint or trade . . . .

In 1934, the Fishermen's Cooperative Marketing Act, ch. 742, §§ 1-2, 48 Stat. 1213-14 (1934) (current version at 15 U.S.C. §§ 521-22 (1976)), extended exemptions similar to those found in the Capper-Volstead Act to fishermen's cooperatives. Many of the antitrust exemption principles found in cases dealing with the fishermen's cooperatives apply to agricultural cooperatives.

27. 308 U.S. 188 (1939). In Rowley & Beshore, *Chicken Integrators' Price-Fixing: A Fox in the Capper-Volstead Coop*, 24 S.D.L. REV. 564 (1979), the authors discuss the broad parameters of the interface of the Capper-Volstead Act and the federal antitrust laws. Five settled principles derived from the case law are listed. First, the Capper-Volstead Act does not completely displace the Sherman and Clayton Acts for cooperatives. Second, Capper-Volstead associations must be composed

exemption to a cooperative allegedly combining with non-exempt<sup>28</sup> persons in restraint of trade.<sup>29</sup> The *Borden* holding made it clear that the Capper-Volstead Act does not give agricultural cooperatives a plenary exemption from the antitrust laws.

The Supreme Court clarified and expanded on the *Borden* holding in *Maryland and Virginia Milk Producers Association v. United States*.<sup>30</sup> In *Maryland and Virginia*, the Supreme Court established that the agricultural cooperative exemption does not extend to unilateral competition-stifling practices. The Court condemned a cooperative's coercive and predatory trade practices which were so far outside the legitimate objectives of agricultural cooperatives as to be clear violations of the Sherman Act.<sup>31</sup>

Subsequent to the Supreme Court's holding in *Maryland and Virginia*, other courts proceeded to determine what conduct constitutes prohibited predatory trade practices.<sup>32</sup> In *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*,<sup>33</sup> a cooperative was held to have violated the Sherman Act when it gave secret rebates to distributors, engaged in manipulation to control the market, and conspired with retail outlets to fix resale prices.<sup>34</sup> The Fifth Circuit Court of Appeals in *North Texas Producers Association v. Metzger Dairies, Inc.*<sup>35</sup> held that an agricultural cooperative which compelled customers to deal exclusively with it and instituted a boycott to accomplish

---

entirely of producers of agricultural products to be eligible for antitrust exemptions. Third, agreements or concerted action between a cooperative and a non-cooperative fall outside exemption from the antitrust laws. Fourth, single cooperatives acting unilaterally receive no Capper-Volstead protection for predatory conduct. Fifth, lower courts have allowed producers and cooperatives to agree on the prices at which they will sell their products. *Id.* at 568-69. See also Warlich & Brill, *Cooperatives vis-a-vis Corporations: Size, Antitrust and Immunity*, 23 S.D.L. REV. 561, 583-84 (1978).

28. Capper-Volstead protection extends only to associations of "[p]ersons engaged in the production of agricultural products." 7 U.S.C. § 291 (1976).

29. *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939). *Borden* established the principle that cooperatives may not lawfully combine or conspire with non-cooperatives in restraint of trade. *Id.*

30. 362 U.S. 458 (1960).

31. *Id.* at 463, 468. *Maryland and Va.* involved the following conduct: (1) The cooperative interfered with shipments of nonmembers' milk; (2) It induced one dairy to switch its marketing outlets from the area of direct competition with the cooperative; (3) Its members boycotted a business to compel it to deal with the cooperative, and (4) The cooperative used its economic power through loans to compel dealings with the cooperative. *Id.* at 468-72.

32. Courts have termed a wide variety of conduct "predatory", many cases involve several instances of improper practices. *E.g.*, *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) (securing excess shipping space to deny it to rival); *Gulf Coast Shrimpers & Oystermans Ass'n v. United States*, 236 F.2d 658 (5th Cir. 1956), *cert. denied*, 352 U.S. 927 (1956), *reh'g denied*, 352 U.S. 1019 (1957) (forcibly excluding non-members from fishing ports and packing facilities, boycotting and picketing of dealers buying below cooperative's prices); *Local 36 of Int'l Fishermen & Allied Workers of Am. v. United States*, 177 F.2d 320 (9th Cir. 1949), *cert. denied*, 339 U.S. 947 (1950) (pressuring suppliers and carriers to cut off rivals, forcing rivals to dump fish, picketing and boycotting dealers who buy below cooperative price); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972) (manipulating government marketing order to "load" the milk pool and drive out rivals); *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (N.D. Cal. 1941) (requirements contract with fish packers).

33. 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

34. *Id.* at 481-88.

35. 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966).

market control engaged in predatory practices.<sup>36</sup> In *Otto Milk Co. v. United Dairy Farmers Cooperative Association*,<sup>37</sup> the court found predatory practices existed when a cooperative used such coercive tactics as boycotts of multi-buyer customers, customer restrictions, and picketing customers of a rival processor.<sup>38</sup> A final example of predatory practices which are not exempt from the antitrust laws is found in *Knuth v. Erie-Crawford Dairy Cooperative Association*.<sup>39</sup> In *Knuth*, the court saw a good cause of action in allegations that a dairy cooperative had engaged in discriminatory pricing by selling below the state-required minimum price.<sup>40</sup>

The above cases illustrate that an agricultural cooperative, once formed, which achieves market power through the use of predatory practices is subject to the same conduct proscriptions of the antitrust laws as any other business corporation. A different result, however, may be called for when an agricultural cooperative achieves substantial market power without the use of any predatory practices. The United States Supreme Court has yet to decide whether this too falls outside the Capper-Volstead antitrust exemptions. The Second Circuit Court of Appeals directly addressed this issue when it handed down its decision in *Fairdale Farms, Inc. v. Yankee Milk, Inc.*<sup>41</sup>

#### OVERVIEW OF THE *FAIRDALE FARMS, INC. v. YANKEE MILK, INC.* LITIGATION

##### *Description of the Parties*

Fairdale Farms, Inc. is a Vermont dairy farm. It is known in the dairy industry as a "handler" in that it produces some of its own milk but primarily buys milk from local farmers, processes it and distributes it to retailers.<sup>42</sup> Since Fairdale Farms purchases milk from dairy farmers in Vermont, New York, and Massachusetts and sells its products in those states,<sup>43</sup> it is subject to a number of state and federal price regulatory plans.<sup>44</sup>

Yankee Milk, Inc. [hereinafter Yankee] is an agricultural cooperative marketing association with a membership of approximately 6,000 dairy

---

36. *Id.* at 195-96.

37. 388 F.2d 789 (3rd Cir. 1967).

38. *Id.* at 797.

39. 395 F.2d 420 (3rd Cir. 1968).

40. *Id.* at 423-24.

41. 635 F.2d 1037 (2d Cir. 1980). The issue of whether gain of market power absent predatory practices falls outside antitrust exemptions was raised prior to *Fairdale Farms* in *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶ 62,053. In that case, the United States District Court for the Western District of Kentucky dismissed an attempt-to-monopolize charge because the United States failed to prove the cooperative's anticompetitive practices rose to the level of predatory trade practices and because the United States failed to prove that there was a dangerous probability that a monopoly would result from the cooperative's practices. For a discussion of the case on appeal, see *infra* notes 170-75 and accompanying text.

42. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77, 111.

43. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1038 (2d Cir. 1980).

44. Brief for Appellant at 8-9, *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980). For a discussion of federal milk marketing orders, see *infra* note 48.

farmers, or "milk producers."<sup>45</sup> It was formed in 1972 through alternate mergers and purchases of stock in the three largest competing New England dairy farmer cooperatives.<sup>46</sup> Each Yankee member signs a membership and marketing contract, terminable annually, whereby the member agrees to sell all milk produced to Yankee. Yankee, in turn, agrees to buy all of the member's milk. It markets the milk and returns the proceeds to the member, less handling and overhead costs.<sup>47</sup>

In the northeastern United States, both the Secretary of Agriculture and the state agencies regulate the price of raw milk by setting minimum prices that handlers, such as Fairdale Farms, must pay producers.<sup>48</sup> During 1973 and 1974, the prices paid by dairy producers for grain, fertilizer, feeds, fuel, and labor continually increased. Rises in the minimum prices did not meet these increasing production costs. The northeastern dairy cooperatives sought the assistance of the Department of Agriculture in hopes of obtaining relief through the federal marketing order pricing mechanism. The Department responded that the cooperatives should negotiate with handlers for higher raw milk prices.<sup>49</sup>

With a view toward securing adequate prices for its members, Yankee and six other area cooperatives organized the Regional Cooperative Marketing Agency, Inc. [hereinafter RCMA]. RCMA is an agricultural cooperative marketing corporation, whose sole function is to fix prices for the member farmers' milk.<sup>50</sup> It differs from the cooperatives that are its members in that it is solely a collection of cooperatives, not an association of farmers. RCMA does not engage in any of the functions which the member coopera-

45. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1038 (2d Cir. 1980).

46. Brief for Appellant at 10, Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980).

47. Brief for Defendant-Appellee-Cross-Appellant at 3, Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980).

48. Milk is one of the major agricultural commodities the federal government regulates. Complex sets of regulations, known as marketing orders are promulgated by the Secretary of Agriculture under the authority given by the Agricultural Marketing Agreements Act of 1937, ch. 296, §§ 1, 2(a)-(m), 3-6, 50 Stat. 246-49 (current version at 7 U.S.C. §§ 601, 602, 608a(5)-(9), 608b-e, 610, 612, 614, 624, 671-74 (1976)).

For milk, each marketing order defines a geographic region to which it applies. The market order area is usually a region with similar production characteristics. It is common for an order to be centered around a population center and extend outward to the "normal" supply area for the population center. Once the geographic area is defined, the order regulates the milk dealers, or handlers, who sell milk in the area. The market orders regulate the *minimum* prices that may be paid by handlers and the prices received by the dairy farmers, or producers, for different classifications of milk. Prices paid by handlers and received by producers are subject to numerous adjustments. FEDERAL MILK MARKETING ORDERS AND PRICE SUPPORT, *supra* note 5, at 2-3.

The orders do not purport to establish a price ceiling. So-called "over-order pricing" has been common for many years in certain markets, particularly the Midwest, where agricultural cooperatives have sought to obtain more adequate prices for their members' milk. See generally Masson & Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 S.D.L. REV. 662 (1978).

For a thorough and informative discussion of federal marketing orders, and specifically federal and state milk marketing orders, see Vetne, *Federal Marketing Order Programs*, in 1 AGRICULTURAL LAW 76-87 (J. Davidson ed. 1981). See also *supra* note 5 and *infra* note 152.

49. Brief for Defendant-Appellee-Cross-Appellant at 5-6, Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980).

50. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1038-39 (2d Cir. 1980).



tives themselves perform on behalf of their members, such as marketing, billing, handling, and processing.<sup>51</sup>

### *Events Giving Rise to Litigation*

At the time of RCMA's formation, many of Yankee's members sold their raw milk to Fairdale Farms. In 1973, Yankee asked Fairdale Farms to pay the over federal marketing order price set by RCMA on milk supplied by Yankee's Massachusetts producers. Fairdale Farms paid it for three months in 1973 with resistance.<sup>52</sup> In 1974, however, Fairdale Farms refused to pay the price established by RCMA. Yankee continued to supply Fairdale Farms for a few months during negotiations. The supply relationship between Yankee and Fairdale Farms ended after Yankee refused to assure Fairdale Farms it would receive forty-five days notice of any supply changes.<sup>53</sup>

Fairdale Farms subsequently brought an action against Yankee and RCMA in federal district court.<sup>54</sup> Fairdale Farms alleged the defendants violated section one of the Sherman Act<sup>55</sup> by fixing the price of raw milk. Section one prohibits contracts, combinations, and conspiracies in restraint of trade. Fairdale Farms also charged the defendants with monopolizing or attempting to monopolize the raw milk market from which Fairdale Farms obtained its supply. The specific wording of section two of the Sherman Act prohibits monopolizing and attempting to monopolize.<sup>56</sup> Both defendants contended section one of the Capper-Volstead Act<sup>57</sup> protected them from liability.

### *The District Court's Opinion*

The United States District Court for the District of Vermont granted summary judgment to Yankee and RCMA on Fairdale Farm's first allegation. Price fixing arrangements are generally held to be *per se* violations of section one of the Sherman Act.<sup>58</sup> Section one of the Capper-Volstead Act,<sup>59</sup> however, exempts qualified agricultural cooperatives from this constraint. The district court held that "qualified cooperatives" includes cooperatives, such as RCMA, who do nothing more than fix prices.<sup>60</sup>

The district court, however, denied the motion of Yankee and RCMA

---

51. Brief for Appellant at 29, *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980).

52. *Id.* at 41.

53. *Id.* at 42-45. From August 1975, until the time the *Fairdale Farms* decision was handed down, an RCMA price had not exceeded a federal order price. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039 (2d Cir. 1980).

54. RCMA was actually joined as a defendant after the suit commenced. Yankee moved for joinder of RCMA as a necessary party. *Id.* at 2.

55. 15 U.S.C. § 1 (1976). *See supra* note 20.

56. 15 U.S.C. § 2 (1976). *See supra* note 20.

57. 7 U.S.C. § 291 (1976).

58. *White Motor Co. v. United States*, 372 U.S. 253 (1963).

59. 7 U.S.C. § 291 (1976).

60. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,115.

for summary judgment on Fairdale Farms' claim that the defendants monopolized or attempted to monopolize trade in raw milk. In doing so, the court rejected the defendants' argument that the Capper-Volstead Act makes it more difficult to prove a section two Sherman Act<sup>61</sup> monopoly violation exists when a claim is brought against an existing, qualified cooperative. The court refused to find, as contended by the defendants, that the Capper-Volstead Act protects agricultural cooperatives not engaged in predatory practices from monopoly claims.<sup>62</sup>

Instead, the court held that a plaintiff claiming an agricultural cooperative has monopolized or attempted to monopolize has no greater burden than if the plaintiff sued a corporation. Moreover, the court held that a cooperative's actions must be judged under the corporate monopolization test<sup>63</sup> of *United States v. Grinnell Corp.*<sup>64</sup> This two-part test proscribes any willful acquisition of monopoly power that is not the result of a superior product, business acumen, or historic accident.<sup>65</sup> The *Grinnell* standard, formulated as a guide for evaluating corporate activities, can be violated even if predatory practices are not found.

The district court found support for its decision to reject the defendants' claim that the Capper-Volstead Act permits agricultural cooperatives to acquire monopoly power, so long as predatory practices are not employed, in the legislative history of the Capper-Volstead Act, as interpreted by a Federal Trade Commission Staff Report on Agricultural Cooperatives<sup>66</sup> [hereinafter FTC Staff Report]. The FTC Staff Report views the legislative history as evidence that Congress intended only to allow farmers to do what individuals may do in establishing a corporation—namely to act together and to set their own prices, but not to form a monopoly.<sup>67</sup> The district court also rejected the defendants' claim because it concluded that courts in prior cases equated cooperatives and corporations under the antitrust laws.<sup>68</sup> In its reading of these materials, however, the district court misconstrued the congressional intent evidenced in Capper-Volstead. Disregarding the fundamental differences between an agricultural cooperative and a corporation,<sup>69</sup> the court arrived at an incorrect holding reversed on appeal.

61. 15 U.S.C. § 2 (1976).

62. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,115.

63. *Id.* at 77,115-16.

64. 384 U.S. 563 (1966).

65. *Id.* *Grinnell* stated the following requirements for a monopolization claim:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*Id.* at 570-71.

66. BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, STAFF REPORT ON AGRICULTURAL COOPERATIVES, (1975) [hereinafter cited as FTC STAFF REPORT].

67. *See id.*

68. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,116-19.

69. *See P. AREEDA & D. TURNER, 1 ANTITRUST LAW* ¶ 228d., at 185-86 (1978).

69. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1040 (2d Cir. 1980).

## THE OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

The appellate opinion in *Fairdale Farms, Inc. v. Yankee Milk, Inc.*,<sup>70</sup> is divided into two distinct parts. The first part deals with Fairdale Farms' allegations under section one of the Sherman Act.<sup>71</sup> The court briefly explains its affirmance of the district court on that point.<sup>72</sup> That part of the opinion will not be discussed further in this comment.

Of more interest is the court's reversal of the district court on the Sherman Act section two<sup>73</sup> monopolization claim. The court found support for its decision in essentially three sources: the language of the Capper-Volstead Act and the legislative history behind antitrust exemptions for agricultural cooperatives; the administrative construction of the Act, and the judicial interpretations of cooperative market power.<sup>74</sup> In order to permit a fuller understanding of the court's holding, this comment will examine each of the areas the Second Circuit relied on.

*Language and Legislative History of the Capper-Volstead Act*

The United States Supreme Court has often examined the legislative history of the Capper-Volstead Act in determining the nature of its interrelationship with the antitrust laws. In doing so, the Court generally has begun by examining the words of the statute.<sup>75</sup> The language of Capper-Volstead is broad and general. The court in *Fairdale Farms* noted that Congress, in drafting Capper-Volstead, did more than broaden the scope of its predecessor, section six of the Clayton Act,<sup>76</sup> so as to bring cooperatives issuing capital stock within that section's antitrust exemptions.<sup>77</sup> Where section six speaks only in terms of cooperative purposes or "mutual help,"<sup>78</sup> Capper-Volstead spells out a broad range of activities in which agricultural cooperatives can engage. These include collective processing, preparing for market, handling, and marketing.<sup>79</sup> While this type of collective action might be deemed monopolization or restraint of trade under conventional antitrust

70. 635 F.2d 1037 (2d Cir. 1980).

71. 15 U.S.C. § 1 (1976).

72. See *supra* text accompanying notes 58-60.

73. 15 U.S.C. § 2 (1976).

74. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981) praised the Second Circuit's opinion when it stated:

*Fairdale Farms* is commended for its illuminating references to the legislative history of Section 6 of the Clayton Act and of the C-V [Capper-Volstead] Act, for its copious references to subsequent congressional enactments favoring farmers and expressing congressional concern over troublesome surpluses in farm products and for its thorough review of the limited but growing number of cases dealing with the scope and effect of Section 6 of the Clayton Act and of the C-V [Capper-Volstead] Act.

*Id.* at 632.

75. See *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 823 (1978); *Maryland and Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 465-66 (1960); *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939).

76. 15 U.S.C. § 17 (1976).

77. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1042 (2d Cir. 1980).

78. See *supra* note 22.

79. See *supra* note 25.

analysis, the language of Capper-Volstead expressly permits it in the absence of undue price enhancement.

The language of section two of Capper-Volstead establishes a detailed procedure whereby the Secretary of Agriculture may regulate agricultural cooperative actions which constitute monopolization or restraint of trade in the form of undue price enhancement.<sup>80</sup> This specifically created regulatory authority would be unnecessary if section one of Capper-Volstead<sup>81</sup> did not permit combinations among farmers which would, in the conventional business context, constitute monopolization or restraint of trade. Had Congress meant to subject the right of combination, for purposes of marketing established in Capper-Volstead, to the normal private and governmental enforcement processes, section two would be superfluous.<sup>82</sup>

The court in *Fairdale Farms* extensively reviewed the legislative history of the Capper-Volstead Act, basing its holding in large part on that legislative history.<sup>83</sup> The rejection by Congress of an amendment offered during the consideration of the Capper-Volstead Act lends strong support for permitting agricultural cooperatives to acquire monopoly power, so long as predatory practices are not employed. The Senate Judiciary Committee proposed to strike the present section two and substitute an amendment that would have specifically prohibited agricultural cooperatives from attaining the market power necessary to achieve price enhancement.<sup>84</sup>

The ensuing debate on this amendment presented conflicting viewpoints. One senator characterized the amendment as an attempt to prohibit cooperatives from attaining market power.<sup>85</sup> Senator Capper, the sponsor of the original bill, argued that the amendment would deny farmers the power necessary to achieve the purposes of the Act.<sup>86</sup> Senator Walsh<sup>87</sup> claimed that rejection of the amendment would permit formation of milk monopolies.<sup>88</sup> Although Senator Walsh's words remained unchallenged, the Senate voted fifty-six to five to reject the amendment.<sup>89</sup>

80. *See supra* note 26.

81. 7 U.S.C. § 291 (1976).

82. *See* April v. National Cranberry Ass'n, 168 F. Supp. 919, 922-23 (D. Mass. 1958). The authors of P. AREEDA & D. TURNER, *supra* note 68, at 186 n.35 state: "It might be argued, however, that the statute was declaratory of the rules governing everybody: namely, they may act together to achieve efficiency when their combined action does not bring market power."

83. *See* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1040-42 (2d Cir. 1980).

84. S. REP. NO. 236, 67th Cong., 1st Sess. 1 (1921). The amendment read: "[N]othing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under [the Federal Trade Commission Act] . . . on account of unfair methods of competition in commerce." *Id.*

85. 62 CONG. REC. 2050 (1922) (remarks of Senator Kellogg, the floor manager of the original bill).

86. 62 CONG. REC. 2058 (1922). Senator Capper stated: "[N]o association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates." *Id.*

87. The court in *Fairdale Farms* described Senator Walsh as the most vociferous opponent of Capper-Volstead's anti-Sherman features. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1041 (2d Cir. 1980).

88. 62 CONG. REC. 2279 (1922).

89. *Id.* at 2281.

The Senate's rejection of the amendment is not sufficient by itself to show Congress wanted agricultural cooperatives to have monopoly power.<sup>90</sup> In enacting Capper-Volstead, however, it is known that Congress was well aware that cooperatives could attain market power through use of the Act's exemptions.<sup>91</sup> The enactment of Capper-Volstead reflected an acceptance of the possibility of conscious acquisition of cooperative market power through combination among producers.<sup>92</sup> The passage of Capper-Volstead also indicates Congress believed the Secretary of Agriculture possessed sufficient power to regulate non-predatory gain of market power by agricultural cooperatives.<sup>93</sup>

The court in *Fairdale Farms* also looked to federal statutes passed subsequent to Capper-Volstead in support of its finding that Congress expected and encouraged farmer representation through strong and effective agricultural cooperatives.<sup>94</sup> By enacting the Cooperative Marketing Act in 1926,<sup>95</sup> Congress authorized the Secretary of Agriculture to establish a cooperative marketing division.<sup>96</sup> That division confers with and advises producers who want to form cooperatives.<sup>97</sup> The Act also enables cooperative associations to exchange and disseminate market and economic information among themselves.<sup>98</sup>

With the passage of the Agricultural Marketing Act in 1929,<sup>99</sup> Congress declared a policy of promoting effective merchandising of agricultural commodities in hopes that agriculture would achieve economic equality with other industries. This policy was to be implemented by encouraging producers to organize into effective associations or corporations for greater unity of effort in marketing.<sup>100</sup> The Act also created a Farm Credit Administration authorized to loan money to cooperatives to assist them in the effective merchandizing of agricultural commodities.<sup>101</sup>

The *Fairdale Farms* court employed a more recent piece of major legis-

90. See FTC STAFF REPORT, *supra* note 66, at 38; Note, *supra* note 1, at 375-76.

91. Senator Capper pointed to the existing 11,000 member California Fruit Growers Exchange as the type of cooperative that would find "definite legalization" under Capper-Volstead. 62 CONG. REC. 2061 (1922).

92. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962) the United States Supreme Court stated that the legislative history of the Capper-Volstead Act indicates that cooperatives of the size and general activities of the 11,000 member California Fruit Growers Exchange were contemplated by the Act.

93. Interestingly, Senator Walsh voted for the House bill when it ultimately passed in the Senate. 62 CONG. REC. 2282 (1922).

94. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1042-43 (2d Cir. 1980). The court stated it was apparent from Capper-Volstead and the major pieces of farm legislation passed subsequent to it that agricultural cooperatives were a favorite child of Congressional policy. *Id.* See *Stark v. Brannan*, 82 F. Supp. 614, 617 (D.D.C. 1949).

95. Cooperative Marketing Act, ch. 725, §§ 1-7, 44 Stat. 802-03 (1926) (current version at 7 U.S.C. §§ 451-57 (1976)).

96. 7 U.S.C. § 452 (1976).

97. 7 U.S.C. § 453 (1976).

98. 7 U.S.C. § 455 (1976).

99. Agricultural Marketing Act, ch. 24, §§ 1, 4-8, 13-15, 46 Stat. 11, 13-14, 17-18 (1929) (current version at 12 U.S.C. §§ 1141-1141j (1976)).

100. 12 U.S.C. § 1141 (1976).

101. See 12 U.S.C. §§ 1141-1141e (1976).

lation to illustrate Congress' continued recognition of the need for stronger and more effective marketing associations of farmers. That legislation is the Agricultural Fair Practices Act, passed in 1968.<sup>102</sup> In order to achieve its goal, Congress, through the Act, forbids any coercive practices by handlers which would interfere with farmers voluntarily joining agricultural cooperatives.<sup>103</sup>

### *Administrative Construction of the Capper-Volstead Act*

The Second Circuit in *Fairdale Farms* also found support for its holding that the Capper-Volstead Act permits agricultural cooperatives to gain full market power, absent predatory conduct, in the administrative construction of the Act. That reliance directly conflicted with the district court's previously discussed reliance on the legislative history as interpreted by a FTC Staff Report.<sup>104</sup>

It is questionable, however, whether the district court should have relied so heavily on the FTC Staff Report. Initially, it is important to note that the report was expressly described by the Federal Trade Commission as not necessarily representing the views of the agency.<sup>105</sup> A report, unadopted even by the body sponsoring its writing,<sup>106</sup> is of minimal authoritative significance. Moreover, although the district court cited two statements found in the FTC Staff Report as support for its refusal to allow agricultural cooperatives greater freedom from the constraints of the Sherman Act than corporations enjoy,<sup>107</sup> it failed to refer to the most relevant statements in the report on the question of cooperative size and power and control of such power. The FTC Staff Report states both that Congress made no attempt to limit the size of agricultural cooperatives during the passage of the Capper-Volstead Act, and that the Secretary of Agriculture would have the power to prevent unduly enhanced prices which resulted from the mere size of an association by dissolution of the association if necessary.<sup>108</sup> Thus, the FTC Staff Report, read in its entirety, does recognize that the right of combina-

102. Unfair Trade Practices Affecting Producers of Agricultural Products, Pub. L. No. 90-288, 82 Stat. 93-95 (1968) (current version at 7 U.S.C. §§ 2301-06 (1976)).

103. 7 U.S.C. § 2303 (1976).

There are several other major pieces of legislation that illustrate Congress' desire to promote gain of market power by agricultural cooperatives. See also Agricultural Adjustment Act of 1933, ch. 25, Title I, §§ 1-22, 48 Stat. 31-41 (current version at 7 U.S.C. §§ 601-04, 607-23) (1976) (Secretary of Agriculture to enter into marketing agreements with associations of producers); Robinson-Patman Act, ch. 592, §§ 1-4, 49 Stat. 1526-28 (1936) (current version at 15 U.S.C. §§ 13-13b, 21a) (1976) (cooperatives permitted to return net earnings and surplus to members).

104. See *supra* text accompanying notes 66-67.

105. FTC STAFF REPORT, *supra* note 66, at title page.

106. 3 TRADE REG. REP. (CCH) ¶ 10,393, at 18,261.

107. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,116. The following are quoted: (1) "Neither side in the [congressional] debate relished the thought of agricultural cooperatives holding monopoly power and inflating consumer prices. The real issue was how monopoly cooperative associations should be controlled." FTC STAFF REPORT, *supra* note 66, at 38; (2) "A fair distillation of Congressional sentiment as to cooperative size might then be: Cooperatives are free to attain the size necessary for efficient marketing and reduction of costs, but must not be allowed to inflate consumer prices through monopoly power." *Id.* at 40.

108. FTC STAFF REPORT, *supra* note 66, at 40.

tion granted agricultural cooperatives in Capper-Volstead is unlimited as to size and market share. Congress must have intended price increases derived from the mere exercise of market power to be subject to the Secretary of Agriculture's sole control.

This position is consistent with the words of a 1973 Federal Trade Commission report which was relied on by the Second Circuit in *Fairdale Farms*.<sup>109</sup> In that report, the Federal Trade Commission stated that if an agricultural cooperative attains a monopoly position, even 100 percent, through natural growth or the voluntary affiliation with or attraction of new members, no illegality would attach.<sup>110</sup> The Justice Department, on behalf of the Federal Trade Commission, has also recently stated that the Capper-Volstead Act authorizes cooperatives to attain monopoly power through natural growth.<sup>111</sup>

### *Judicial Interpretation of Cooperative Market Power*

The *Fairdale Farms* district court noted that in every case to date where an agricultural cooperative was found guilty of monopolization, the cooperative had engaged in predatory practices.<sup>112</sup> This fact, instead of lending support to the district court's holding, reflects an understanding by the courts that Congress, when it enacted Capper-Volstead, did not intend to prohibit the voluntary and natural growth that agricultural cooperative needed in order to effectively represent farmers. In its opinion, the appellate court in *Fairdale Farms* found that this is how those courts which have directly addressed the issue have construed the Act.<sup>113</sup> Following, is an overview of the cases the court in *Fairdale Farms* used to substantiate this conclusion.

#### a. *Supreme Court Interpretation of the Capper-Volstead Act*

The United States Supreme Court has expressly recognized that the Capper-Volstead Act is an exception to the general monopoly prohibi-

109. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980).

110. *Food Price Investigation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 715 (1973) (Federal Trade Commission announces enforcement policy on dairy mergers).

111. In Brief of Regional Cooperative Marketing Agency, Inc. at 24-25, *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980) (citing Brief for Appellees and Cross-Appellants Federal Trade Commission at 39, *Sunkist Growers, Inc. v. Federal Trade Comm'n* (9th Cir., filed Sept. 13, 1979)), the Justice Department was reported as stating:

Thus, it is clear that the exemption provided by Section 1 of Capper-Volstead and Section 6 of the Clayton Act extends not only to the formation of a cooperative but also to: The achievement of monopoly power by the cooperative through natural growth—*i.e.*, through the voluntary addition of members to the cooperative or through mergers between producer cooperatives; the elimination of competition among members of the cooperative in setting the price for and condition of marketing of their products . . . .

*Id.*

112. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,116.

113. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1043 (2d Cir. 1980). Practically every scholar in the antitrust field also agrees Capper-Volstead allows agricultural cooperatives to achieve substantial market power absent reprehensible practices. *Id.* at n.5. See, e.g., P. AREEDA & D. TURNER, *supra* note 68, at 186-88.

tions.<sup>114</sup> In *Maryland and Virginia Milk Producers Association v. United States*,<sup>115</sup> the Court placed primary emphasis on Congress' intent behind enacting Capper-Volstead. That intent, stated the Supreme Court, was clearly to allow farmers to combine and subsequently act together in cooperative associations free from antitrust proscriptions. Unity of effort was encouraged in order to give farmers the same "unified competitive advantage" available to businessmen acting through corporations.<sup>116</sup>

In *Maryland and Virginia*, the Supreme Court did, however, limit the freedom of action of farmer organizations. Its holding states that the statutory exemptions do not give protected agricultural organizations freedom to engage in predatory trade practices at will<sup>117</sup> or to achieve monopoly by preying on independent producers, processors or dealers.<sup>118</sup> It should be remembered this limitation was premised on the proposition that just because farmers' legitimate desires for unity will incorporate, of necessity, a concept of corporate aggrandizement does not *per se* make this method of cooperative growth illegal.<sup>119</sup>

The Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*,<sup>120</sup> remanded to the district court a case in which it noted the defendants possessed a substantial share of the citrus market.<sup>121</sup> The Supreme Court commented, with apparent approval, that the lower court's instruction on the Clayton and Capper-Volstead Acts merely stated that the cooperatives could lawfully have a monopoly of the commodities they dealt in.<sup>122</sup>

Recently, the Supreme Court reemphasized the special authority granted farmers by Capper-Volstead to combine into associations and marketing agencies.<sup>123</sup> In *National Broiler Marketing Association v. United States*,<sup>124</sup> Mr. Justice White reaffirmed that the assistance offered farmers by Capper-Volstead was to allow combination in a way that would otherwise violate the antitrust laws. He concluded that this resulted in a bilateral monopoly that benefited both the producer and the consumer.<sup>125</sup>

114. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 388 & n.14 (1956).

115. 362 U.S. 458 (1960).

116. *Id.* at 465-66.

117. *Id.*

118. *Id.* at 467.

119. *See* *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 560 (1939).

120. 370 U.S. 19 (1962).

121. *Id.* at 29-30.

122. *Id.* at 24-25.

123. In *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978), the Supreme Court stated: "Moreover, there is persuasive evidence that Congress' concern for protecting contract growers vis-a-vis processors and handlers has not abated." *Id.* at 837 (Brennan, J., concurring).

124. 436 U.S. 816 (1978). For an in depth discussion of the Supreme Court's holding in *National Broiler*, see Rowley & Beshore, *supra* note 27.

125. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 842 (1978) (White, J., dissenting). The specific goal of permitting agricultural organizations was to combat purchasers' organizations facing the farmer. Elimination of unnecessary middlemen can lower the price paid by consumers. And more of the price consumers pay goes directly to the producer. *See id.* at 842-43.



b. *Lower Courts' Interpretations of the Capper-Volstead Act*

The court in *Fairdale Farms* recognized that lower courts have followed the lead of the Supreme Court in imposing liability only for predatory activity by agricultural cooperatives, rather than for the mere acquisition of market power through combination.<sup>126</sup> Perhaps the most often quoted statement in this regard is Judge Wyzanski's instructions to the jury in *Cape Cod Food Products, Inc. v. National Cranberry Association*.<sup>127</sup> The Judge instructed the jury that it was no violation of the antitrust laws for an agricultural cooperative to attempt to acquire even a 100 percent position in the market, if it attempts to do so exclusively through means approved by the Capper-Volstead Act.<sup>128</sup>

*Bergjans Farm Dairy Co. v. Sanitary Milk Producers*<sup>129</sup> involved a conspiracy with retail stores to fix the resale price of milk. The *Bergjans* court found that the defendant's exercise of market power through predatory pricing and secret rebates to favored customers constituted an abuse not protected by the authority to engage in legitimate marketing practices under Capper-Volstead.<sup>130</sup> The court held, however, that the cooperative's fifty-five to sixty percent market share would be legal if obtained, even intentionally, by non-predatory acts.<sup>131</sup>

In *North Texas Producers Association v. Metzger Dairies, Inc.*,<sup>132</sup> the appellate court upheld a jury verdict imposing liability upon the defendant association for retaliatory conduct it engaged in after the plaintiff refused to pay the defendant's desired price.<sup>133</sup> The defendant association supplied eighty-five to ninety percent of the raw milk marketed in the relevant area.<sup>134</sup> The court's opinion makes it clear that the basis for liability was neither the acquisition of this extensive market power nor the imposition of a price higher than the federally regulated minimum price; rather, liability resulted solely because the defendant's abusive, retaliatory conduct fell outside legitimate Capper-Volstead marketing procedures.<sup>135</sup>

126. Decisions not dealt with in the text of this comment where a lower court held agricultural cooperatives may lawfully attain a monopoly of a market include: *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 216 nn. 10-11 (9th Cir. 1974) (court adopted commentator's presentation stating cooperatives could lawfully acquire 100 percent of a market); *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266, 268 (D. Colo. 1964) (court commented that monopoly power probably was lawful if obtained through voluntary association). See also *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204-05 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 423 (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).

127. 119 F. Supp. 900 (D. Mass. 1954).

128. *Id.* at 907.

129. 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966). See *supra* notes 33-34 and accompanying text.

130. *Id.* at 483-84.

131. *Id.* at 483.

132. 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966). See *supra* notes 35-36 and accompanying text.

133. *Id.* at 195-96.

134. *Id.* at 194.

135. *Id.* at 194-96.

## PRESENT MARKET POWER OF AGRICULTURAL COOPERATIVES

Despite overwhelming authority to the contrary, the district court in *Fairdale Farms* held that the Capper-Volstead Act prevents agricultural cooperatives, as well as corporations, from attaining market power through non-predatory means.<sup>136</sup> The district court's holding is not an anomaly. It exemplifies a growing concern that the specific economic problems believed peculiar to agriculture when Capper-Volstead was enacted in 1922 have been conquered or controlled.<sup>137</sup>

The changed conditions of farming are a major reason espoused for eliminating antitrust exemptions once an agricultural cooperative is formed. These changed conditions include increased farm size, mechanization, and improved management.<sup>138</sup> With the combined sales of the largest 100 agricultural cooperatives reaching \$50.3 billion in 1980, farmers no longer appear to be in need of antitrust exemptions to help equalize them with business corporations.<sup>139</sup> Those opposed to antitrust exemptions for operating agricultural cooperatives argue that it is now possible, contrary to Congressional opinion at the time Capper-Volstead was enacted,<sup>140</sup> for cooperatives to obtain unrestrained monopolistic power. The Department of Agriculture predicts that in the future less than twenty cooperatives will control the nation's milk supply; even today, it is not uncommon for one cooperative to dominate the national production of a single commodity.<sup>141</sup> Moreover, opponents of cooperative exemptions contend that a small entrepreneur is just as helpless against a large cooperative today as the individual farmer was against corporate processors and distributors at the turn of the century. Since the entire thrust of the antitrust laws militates against concentration of wealth and power and their concomitant potential for abuse, opponents argue agricultural cooperatives should be treated as the business

136. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029.

137. The view that Capper-Volstead monopoly exemptions are unnecessary today is adamantly espoused in at least three works. See generally Note, *supra* note 1; FEDERAL MILK MARKETING ORDERS AND PRICE SUPPORTS, *supra* note 5; FTC STAFF REPORT, *supra* note 66.

138. Note, *supra* note 1, at 358-59.

139. Davidson, Street & Wissman, *Top 100 Dominate Business Scene; Sales Hit \$50.3 Billion by '80*, FARMER COOPERATIVES, Nov. 1981, at 4. Seven agricultural cooperatives ranked among the top 500 U.S. industrial corporations in 1980. Ingalsbe, *Cooperative Growth Both Source of Pride, Future Challenge*, FARMER COOPERATIVES, July 1981, at 4, 8.

140. During the debates over the Capper-Volstead Act, Senator Capper stated: "But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. *No other industry except agriculture has this automatic safeguard* (emphasis added)." 62 CONG. REC. 2059 (1922).

141. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *supra* note 18, at 259. The milk industry is dominated by regional "supercooperatives." These cooperatives control very large percentages of the raw milk supply in many metropolitan areas. Four hold over 70% of the milk supply in the metropolitan regions spread from Ohio to Colorado and from the Great Lakes to the Gulf. FTC STAFF REPORT, *supra* note 66, at 115-16.

Examples of cooperatives dominating the production of one commodity are: Ocean Spray, which handles 85% of the cranberries produced; and Sunkist, handling 60% of the western citrus. Ingalsbe, *supra* note 139, at 5.

entities they really are.<sup>142</sup>

While the view of those opposed to antitrust exemptions for agricultural cooperatives may, in some respects, be valid, it fails to appreciate the broad scope of contemporary agriculture. Cases construing the Capper-Volstead Act relate to specialty products such as citrus fruit, milk, and broilers.<sup>143</sup> The activities engaged in by agricultural cooperatives, however, encompass a great deal more than marketing these products.<sup>144</sup> A cross-section of agricultural cooperatives illustrates that many are not nearly so large or so powerful as generally alleged.<sup>145</sup> Many producer cooperatives can do little more than shop around to determine *who is giving* the best price. In reality, there is very little price-asking being done by farmers and their cooperatives on many agricultural commodities.<sup>146</sup>

Although the number of farms has declined and their size has increased,<sup>147</sup> the fundamental structural characteristics that set agriculture apart from industrial markets in the 1920's remain today. In the United States, production agriculture more nearly approaches the model of perfect competition than any other sector of the American economy.<sup>148</sup> In contrast, the concentration of the food manufacturing and retailing industries has steadily increased. This is the sort of bargaining power gap which led Congress to enact exemptions for cooperatives two generations ago.<sup>149</sup>

Unlike industrial corporations whose economic power is based on own-

142. Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 99 (1958).

143. See generally *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) (citrus fruit cooperative as defendant); *Maryland and Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960) (milk producer involved in action); *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (broiler marketing association examined).

144. For a discussion of cooperative classifications, see *supra* note 1. In 1979, there existed 3,825 marketing, 2,507 farm supply, and 113 related service cooperatives. FARMER COOPERATIVE STATISTICS 1979, *supra* note 6, at 20. Cooperatives also market such things as dry beans and wool. They supply meats, groceries and containers to farmers; they engage in activity such as dairy-herd improvement and cotton ginning. *Id.* at 5, 25, 56.

145. In 1979, 9.2% of all agricultural cooperatives, or 596, were in the less than \$100,000 volume group. 16.1%, or 1,036, were in the \$100,000-\$999,999 range. 45.2%, or 2,913, were in the \$1 million-\$4.9 million range. Only 0.2%, or 10 cooperatives, reached a volume of \$1 billion and over. FARMER COOPERATIVE STATISTICS 1979, *supra* note 6, at 10. For a comparison between the total sales and assets of cooperatives and their non-cooperative counterparts, see Ingalsbe, *supra* note 139, at 5-8.

146. Lemon, *supra* note 1, at 446.

147. 2,491,010 farms existed in 1975. This included 1,062,723,000 acres of land and the average size farm was 427 acres. By 1980, the number of farms dropped to 2,309,130. This included 1,046,713,000 acres of land with the average size farm at 453 acres. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 1980, at 417 (1980).

148. McCormick, *Modification of the Agricultural Cooperative Exemption: Good or Bad?*, 48 ANTITRUST L.J. 565, 574-75 (1979).

149. Purchasers of farm products are oligopsonist buyers. An oligopoly is a condition in a market in which so few producers supply a commodity or service that each of them can influence its price, with or without an agreement between them. E. THORNDIKE & C. BARNHART, THORNDIKE BARNHART ADVANCED DICTIONARY 714 (1973). Even a strong opponent to antitrust exemptions for agricultural cooperatives admits the bargaining-power gap between producers and purchasers is as wide today as it was fifty years ago. The author admits that any consolidation of farm operations and growth of cooperatives has been matched by parallel increases in purchaser power. Note, *supra* note 1, at 364-65.

ership of resources, cooperatives must rely on the support of their membership.<sup>150</sup> Agricultural cooperatives do not and cannot control the supply of commodities. Production decisions remain in the hands of the individual farmers who voluntarily affiliate with the cooperative. If the cooperative does not respond to the needs of its members, those members can withdraw. The cooperative members can also increase the volume produced at any time.<sup>151</sup>

The above evaluation of the actual present market power of agricultural cooperatives<sup>152</sup> leads to a likely explanation for the district court's holding. Possibly, the lower court in *Fairdale Farms* permitted its construction of the Capper-Volstead exemptions to be colored by the economic power of Yankee and RCMA, or by its concept of cooperatives' bargaining leverage generally. But the Second Circuit Court of Appeals was also aware of the defendants' market power and the market power of dairy cooperatives in general. It, however, followed the congressional intent evidenced in Capper-Volstead and retained full monopoly exemptions for agricultural cooperatives, absent predatory actions. This approach was superior because, as the court in *Fairdale Farms* noted, it is the duty of Congress, not the courts, to determine whether there has been change in the market power of agricultural cooperatives sufficient to warrant a redesign of the statute.<sup>153</sup>

#### EVALUATING PREDATORY PRACTICES AFTER *FAIRDALE FARMS*

The court in *Fairdale Farms* held that the corporate monopolization test found in *United States v. Grinnell Corp.*<sup>154</sup> does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives. It applies only to the acquisition of such power by other, predatory means.<sup>155</sup> The court stated that predatory practices include such tactics as picketing and harassment, boycotts, coerced membership, discriminatory pricing, and actions which stifle or smother competition.<sup>156</sup> Because it was not clear whether the district court made its finding on the premise that the mere gain of market power by an agricultural cooperative violates section two of the Sherman Act<sup>157</sup> or on the ground that predatory acts had been sufficiently shown, the appellate court remanded to

150. For a listing of the differences between cooperatives and non-cooperative corporations, see M. SCHAARS, *supra* note 4, at 11.

151. McCormick, *supra* note 148, at 575.

152. See *supra* notes 5 and 48. See FTC STAFF REPORT, *supra* note 66. The FTC STAFF REPORT states that in practically every market where a cooperative has achieved a dominant position, that market has been regulated by a federal and/or state marketing order. This raises the question whether a cooperative, not governed by a marketing order, could build a dominant market share and raise prices above the competitive level. The FTC STAFF REPORT claims it has never been established that a marketing order is a necessary condition for cooperative dominance and ability to cause significant anticompetitive effects. *Id.* at 138.

153. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 n.7 (2d Cir. 1980).

154. 384 U.S. 563 (1966). See *supra* note 65 and accompanying text.

155. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980).

156. *Id.* at 1044. See *supra* notes 27-40 and accompanying text.

157. 15 U.S.C. § 2 (1976).

the district court for reconsideration of the predatory issue.<sup>158</sup> Thus, the Second Circuit did not address whether Yankee and RCMA's conduct amounted to predatory practices. Nor did the court address what future effect, if any, its holding in *Fairdale Farms* will have on the evaluation of predatory practices.

Two cases decided subsequent to and expressly following *Fairdale Farms*<sup>159</sup> indicate how other courts view the impact of the Second Circuit's decision on the finding of predatory practices. A brief examination of the facts and holding in each case follows.

### *The Kinnett Dairies, Inc. v. Dairymen, Inc. Decision*

Kinnett Dairies, Inc., a closely-held Georgia corporation, is primarily engaged in the processing of Grade A milk for fluid consumption. Dairymen, Inc. [hereinafter D.I.] is an agricultural cooperative marketing association of dairy farmers. It was formed in 1968 as a combination and successor-in-interest to eight cooperatives located throughout the southeastern United States.<sup>160</sup>

Kinnett Dairies brought suit alleging D.I. entered into a series of anticompetitive arrangements with other marketing cooperatives in order to obtain and maintain the power to control prices and exclude competition. Kinnett Dairies' complaint also alleged D.I., as it marketed members' milk, unilaterally engaged in acts which constituted predatory conduct prohibited by the antitrust laws.<sup>161</sup>

Kinnett Dairies cited seven different types of unilateral activities D.I. had engaged in, and it claimed the activities were all predatory in nature. These activities included the following: 1) D.I. announced non-negotiable premium prices; 2) D.I. unilaterally cut off Kinnett's hauling operation in retaliation for Kinnett's competing for supplies from individual farmers; 3) D.I. threatened to, and actually did, cut off any customer who tried to replace any portion of D.I.'s supplies; 4) D.I. successfully warded off entry of a potential competitor into the market; 5) D.I. insisted upon full supply contracts; 6) D.I. cut off its supply to Kinnett Dairies without notice, and 7) D.I. took affirmative steps to stop Kinnett Dairies from receiving alternative sources of supply.<sup>162</sup>

---

158. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980). *Fairdale Farms* adamantly contended both at the district and circuit court levels that it had shown Yankee and RCMA engaged in predatory practices. See Reply Brief of Appellant at 26-32, *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980).

159. These two decisions are *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981) and *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711 (N.D. Cal. 1981), was also decided subsequent to and expressly followed the holding in *Fairdale Farms*. After finding an alleged price-fixing combination among cooperatives exempt from section 1 of the Sherman Act, the court also denied an attempted monopolization claim. The *GVF* court stated it would be anomalous to allow immunity for price-fixing activity but not for a monopoly that resulted from the same activity. *Id.* at 714.

160. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 613 (M.D. Ga. 1981).

161. *Id.* at 614.

162. *Id.* at 617-18.

After considering each of the above activities, the court in *Kinnett* held that D.I.'s complained-of activities, whether considered individually or in conjunction with each other, were not competition stifling or predatory in any sense of the word.<sup>163</sup> The court noted that premium pricing with respect to milk does not necessarily equate with gouging. The prices set through federal regulation<sup>164</sup> are merely minimum prices. As to full supply contracts, the court observed that all of the complained-of provisions of the contracts were matters D.I. was willing to negotiate with its customers. With respect to the other alleged predatory conduct, the *Kinnett* court pointed out that all of these claims, with the exception of the cut-off of supplies to Kinnett Dairies, were considered in detail and rejected in the case of *United States v. Dairymen, Inc.*<sup>165</sup> The court found that these latter transactions, including D.I.'s refusal to deliver milk to Kinnett Dairies involved business negotiations between business entities. On D.I.'s refusal to deliver, the court commented: "[t]his was not a refusal to sell milk; it was at most a refusal to sell at a price less than all other purchasers from D.I. had agreed to pay."<sup>166</sup>

Thus, the *Kinnett* court held that D.I. was protected from liability by virtue of the Capper-Volstead exemptions because its activities had not amounted to predatory practices.<sup>167</sup> The court cited with approval the holding in *Fairdale Farms*<sup>168</sup> stating *Fairdale Farms* sheds light upon the meaning of the term predatory. The *Kinnett* court held against Kinnett Dairies' predatory conduct claim when it found tactics such as picketing and harassment, boycotts, coerced membership and discriminatory pricing—the activities specifically deemed predatory in *Fairdale Farms*—conspicuously absent.<sup>169</sup>

### *The United States v. Dairymen, Inc. Decision*

Subsequent to the *Kinnett* decision, *United States v. Dairymen, Inc.*,<sup>170</sup> where the court held an agricultural cooperative exempt from the antitrust laws in the absence of predatory practices, was heard on appeal. The Sixth Circuit Court of Appeals affirmed in part, reversed in part, and remanded.<sup>171</sup>

The appellate court in *Dairymen* cited with approval the *Fairdale*

163. *Id.* at 638.

164. *See supra* notes 5, 48, 152.

165. *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶ 62,053. Note that the *Kinnett* court incorrectly cites this case to 1978-2 Trade Cas. (CCH) ¶ 62,186. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 634 (M.D. Ga. 1981). *United States v. Dairymen, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,186, is a one page memorandum opinion given after the plaintiff proposed a supplemental judgment following the entry of judgment found at 1978-1 Trade Cas. (CCH) ¶ 62,053.

166. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 634-37 (M.D. Ga. 1981).

167. *Id.* at 638.

168. *See supra* note 74.

169. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 642 (M.D. Ga. 1981).

170. 1978-1 Trade Cas. (CCH) ¶ 62,053. *See supra* note 41 and note 165 and accompanying text.

171. *United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981).

*Farms* holding that mere accretion of monopoly power through voluntary combination is immunized by the Capper-Volstead Act. The term predatory practices, stated the court, is intended to distinguish monopolies acquired through anticompetitive practices from those gained through lawful accretions of market power. The court noted that predatory practices are present when an anticompetitive practice exists without business justification for it. The *Dairymen* court, however, found the district court set too high a burden on the United States, as plaintiff, when it required the United States to show that D.I.'s practices rose to this level of predatory practices. The *Dairymen* court held the plaintiff was only required to show that the agricultural cooperative attempted to monopolize.<sup>172</sup> The offense of attempt to monopolize requires only that the defendant has engaged an anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful.<sup>173</sup>

#### *Exempt Agricultural Cooperative Activity After Kinnett and Dairymen*

Both the *Kinnett* and *Dairymen* decisions specifically follow the holding in *Fairdale Farms*. In *Kinnett*, the court held conduct, which clearly appears outside the Capper-Volstead exemptions, to be non-predatory. *Kinnett* reached its decision after finding the predatory conduct identified in *Fairdale Farms* conspicuously absent.<sup>174</sup> It is unlikely, however, that the court in *Fairdale Farms* intended to extend the Capper-Volstead exemptions to all activities it did not specifically mention as predatory. Moreover, *Kinnett* relied on a holding which was reversed and remanded in *Dairymen*. These facts lead one to question the precedential value of the *Kinnett* holding.

While the *Kinnett* court narrowly read *Fairdale Farms* in determining what activities are predatory, the *Dairymen* court took the opposite approach. In *Dairymen*, the court established a category of prohibited predatory acts not alluded to in *Fairdale Farms*. The *Dairymen* court found that any agricultural cooperative which possesses market power and engages in improper anticompetitive behavior will be subject to antitrust liability. Whether courts other than *Dairymen* will also evaluate cooperative activity under this new standard is uncertain. Perhaps this is a way of establishing a middle ground between no antitrust exemptions once an agricultural cooperative is formed, and complete antitrust exemptions for gain of market power by agricultural cooperatives, absent predatory conduct. Use of this new standard would, however, involve legislation by the courts; an activity the

---

172. *Id.* at 194-95.

173. *Id.* at 194 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951)).

174. In *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711 (N.D. Cal. 1981), the court also found no showing of predation when the plaintiff failed to allege the defendants engaged in the activities the court in *Fairdale Farms* specifically mentioned as predatory. The court stated: "there are alleged no pickets, no boycotts, no payments of secret rebates, no active coercive tactics—in short, no 'competition-stifling practices' disapproved by Capper-Volstead." *Id.* at 716.

court in *Fairdale Farms* refused to engage in.<sup>175</sup>

#### CONCLUSION

Agricultural cooperatives have enjoyed exemptions from the antitrust laws since section six of the Clayton Act and the Capper-Volstead Act were enacted by Congress in the early 1900's. The exemptions have not, however, been plenary. Early on, courts removed the antitrust exemptions from any agricultural cooperative that engaged in competition-stifling, predatory practices. The courts did not address whether agricultural cooperatives would receive exemption status under Capper-Volstead if they gained market power through non-predatory means.

The Second Circuit Court of Appeals addressed this issue in its recent decision in *Fairdale Farms*. After examining the language and legislative history of the Capper-Volstead Act and administrative construction and judicial interpretation of the Act for Congressional intent, the court felt bound to grant full antitrust exemptions to agricultural cooperatives.

Compelling arguments are raised in favor of treating business corporations and agricultural cooperatives alike for purposes of the antitrust laws. These arguments focus on the many changes agriculture has experienced in the last sixty years. While agriculture is no longer the same as it was at the time Capper-Volstead was enacted, the major reasons for passing the Act still exist. Moreover, as stated by the court in *Fairdale Farms*, Congress, not the courts, must determine whether there is sufficient change to warrant a redesign of Capper-Volstead.

The future effect of the holding in *Fairdale Farms* on the determination of predatory practices is not yet known. Courts may choose to develop an intermediate level between no antitrust exemptions, once an agricultural cooperative is formed, and complete antitrust exemptions for gain of market power by agricultural cooperatives, absent predatory conduct.

ALICE SCHUMACHER HORNEBER

---

175. See *supra* note 153 and accompanying text.