An Agricultural Law Research Article

Agricultural Cooperatives and the Antitrust Laws

by

William E. Peters

Originally published in NEBRASKA LAW REVIEW
43 NEB. L. REV. 73 (1963)

Comments

AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS

I. INTRODUCTION

Agricultural cooperatives are not immune from antitrust prosecution, but neither are the antitrust laws completely applicable to them. By statute, particularly the Capper-Volstead Act[1] and Section 6 of the Clayton Act,[2] agricultural cooperatives are freed from some of the limitations imposed by the antitrust laws. Where these exemptions place agricultural cooperatives on the antitrust spectrum is a continuing problem faced by the courts. After a synopsis of the principal problems involved, this article will review the legislative history of agricultural cooperative immunity, examine the judicial interpretation of the exemptions, and conclude by offering recommendations for the future.

II. THE MAJOR ISSUES

The antitrust laws are all-inclusive, pervading the entire field of business activities. Based upon common law abhorrence of business restraints, such laws have no *inherent* exceptions. If an activity is to be conducted outside the scope of the antitrust laws, it must be done on the basis of a specific exemption. Antitrust immunity is not lightly implied.[3] Therefore, in any controversy, not only is the particular statute important, but a consideration of the intent of Congress and the over-all statutory scheme is an analytical necessity.

The basic purpose of antitrust law is to protect the consumer from the overpowering strength of producer combinations. Consumer interests are safeguarded, not by regulation, but by the Justice Department keeping the market place in order by preventing such combinations. Whenever exceptions are made, the consumer is protected by regulations and regulatory agencies.[4] Congress,

---

[1] 7 U.S.C. §§ 291, 292 (1958).

[2] 15 U.S.C. § 17 (1958).

[3] United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715, 1734 (1963); Silver v. New York Stock Exch., 83 Sup. Ct. 1246, 1257 (1963); California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962).

[4] Provisos for a significant economic group, such as agricultural cooperatives, to be exempt from antitrust laws are not shocking to

when it exempted agricultural cooperatives from portions of the antitrust laws, followed this pattern by providing for regulation by the Secretary of Agriculture.

In order to establish a proper perspective it is necessary to identify the primary issues before examining the legislative setting of agricultural exemptions. These issues are divided into four divisions: (1) *Jurisdiction*—posing the question of whether cooperatives are immune from the antitrust laws. (2) *Cooperative-noncooperative activity*—concerning whether or not cooperatives may combine and conspire with noncooperatives and still remain within the exemptions provided by Congress. (3) *Inter-Cooperative activity*—involving two principal questions: (a) To what extent may two cooperatives work in concert with each other? (b) What are the permissible limits of cooperative merger and acquisition? (4) *Intra-cooperative activity*—presenting several interrelated problems: To what extent is a cooperative, acting alone, exempt from the antitrust laws? What percentage of a given market may a cooperative control? By what means? What contracts may the cooperative make with its members? What are legitimate objectives of an agricultural cooperative? And what organizational structures may be used? May cooperatives federate, or must they remain autonomous?

Congress and the courts have wrestled with these basic problems over the past seventy years. In so doing, a purposeful attempt to develop at least some degree of agricultural immunity from the antitrust laws becomes apparent. This is illustrated by the following examination of the legislative history and the judicial interpretation thereof.

---

students of antitrust legislation. Congress has passed numerous acts containing exemptions from the antitrust statutes. Examples are, The Shipping Act of 1916, Interstate Commerce Act, Civil Aeronautics Act, and others. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 388 n.14 (1956); Saunders, *The Status of Agricultural Cooperatives under the Antitrust Laws*, 20 FED. B.J. 35, 37 (1960); *Antitrust and the Regulated and Exempt Industries*, 19 A.B.A. Antitrust Section 260 (1961). However, the peculiar difficulty involved in the exemptions relating to agricultural cooperatives is that Congress "did not draw from the legislative formulary the indisputable exempting language of the type used by Congress in other statutes conferring antitrust immunity." Saunders, *The Status of Agricultural Cooperatives under the Antitrust Laws*, 20 FED. B.J. 35, 37 (1960).

III. THE DEVELOPMENT OF AGRICULTURAL ANTITRUST IMMUNITY

A. The Sherman Antitrust Act

An examination of the legislative history of the exemption of agricultural cooperatives from the antitrust laws necessarily begins with the Sherman Act.[5] This statute resulted from years of agitation for the control and regulation of monopolies and trusts. Senator Sherman introduced this bill in 1889, and during the Senate debates expressed the reason for such legislation:[6]

> These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.

During the debates Senator Sherman said that agricultural and labor organizations would not be included within the prohibition of the Act.[7] The Act, however, contained no provisions specifically exempting agricultural organizations.

---

[5] 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 & 3 (1958). The relevant portions of the Act are: "§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is delcared illegal . . . .
§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .
§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

[6] 21 Cong. Rec. 2461 (1890). See also speech of Senator George to the effect that the legislation was for the benefit of the people, "especially agricultural people." 21 Cong. Rec. 2598 (1890) and the Ingall's amendment regarding futures markets, 21 Cong. Rec. 2462-63 (1890).

[7] Senator Sherman offered the following amendment during consideration in the Committee of the Whole: *"Provided,* That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or

In the intervening years between the passage of the Sherman Act and the next major antitrust legislation, the status of agriculture and labor under the statute was at best questionable.[8] Congressional efforts to add an agricultural exemption to the statutes were universally unsuccessful.[9]

B. CLAYTON ANTITRUST ACT

In Section 6 of the Clayton Act,[10] Congress finally enacted an exemption for the benefit of labor and agriculture. Section 6 reads:[11]

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes 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.

There was little unanimity in Congress on the degree of permissive activity granted by the Act.[12] While agreeing that agricul-

---

horticultural products." This amendment was adopted but subsequently deleted when the bill was referred back to the Committee on the Judiciary. 21 CONG. REC. 2611, 2731 (1890).

[8] In 1908, the Supreme Court in Loewe v. Lawlor, (The Danbury Hat Case), 208 U.S. 274 (1908), clearly interpreted the antitrust laws to include labor and agricultural organizations. "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." *Id.* at 301.

[9] For a history of Congressional attempts to pass labor and agricultural exemptions between 1890 and 1914 see 51 CONG. REC. 9246-47 (1914) (remarks of Rep. MacDonald).

[10] Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies (Clayton Antitrust Act), 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

[11] 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958). (Emphasis added.)

[12] Numerous amendments were offered. Among them were the Webb [51 CONG. REC. 9538, 9566 (1914)] and Thomas [51 CONG. REC. 9566-69 (1914)] amendments offering general exemption from the antitrust laws; the Nelson [51 CONG. REC. 9569 (1914)] amendment providing specifically for cooperatives to buy and sell; and the Cummins [51 CONG. REC. 14546-47 (1914)] amendment which sought to permit all union activities but prohibit any commercial activities by cooperatives. These and other amendments were defeated.

tural organizations were exempt, a wide range of opinions prevailed as to what was "lawfully carrying out the legitimate objects thereof." Representative Webb of North Carolina had charge of the bill on the floor of the House. He felt that any time farmers formed organizations for pecuniary gain or attempted to monopolize or restrain trade, such organizations and their members would be subject to the antitrust laws.[13] At the other extreme Senator Thompson of Kansas felt, "[W]ithholding crops for higher prices, refusing to work for certain wages, and acts of that character would not be unlawful . . . ."[14]

C. CAPPER-VOLSTEAD ACT

Agriculture was generally dissatisfied after the passage of Section 6 of the Clayton Act. Dissatisfaction was not with what the Act had done, but with what it had not done. It assured farm organizations distributing literature and crop information to their members that this was legal, but it did nothing to relieve such organizations in the market place.[15] The farmer found himself selling produce in a buyer's market, with the latter establishing prices. In like manner the buying farmer was subject to a seller's market. Because of this, agriculture demanded and received permission from Congress in the Capper-Volstead Act to organize and develop bargaining power in the market place.[16]

---

[13] 51 CONG. REC. 9571 (1914).

[14] 51 CONG. REC. 13848 (1914). The intent of Congress was probably that expressed by Representative Webb. Congressmen Volstead, Nelson and Morgan, who thought the act should go much further, filed a minority report supporting the Webb intrepretation: "[T]he only sort of farmer organization which this section sanctions is one which does nothing more than to discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the antitrust laws." Brief for Appellant, p. 33, Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

[15] During the war years the American farmer had responded to the ever increasing demand for food and fiber. High market demands terminated with the cessation of hostilities. Agricultural production, however, did not experience an adjustment. Food and fiber prices declined, and characteristically the farmer, in order to compensate, strove to produce more so that his total income would remain the same. The result was chaos and an agricultural depression that existed until war clouds started gathering over Europe some twenty years later.

[16] 42 Stat. 388 (1922), 7 U.S.C. §§ 291, 292 (1958). Section 291 provides that: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock,

The first concerted action in Congress began in 1920 when Representative Volstead and Senator Capper introduced parallel bills to authorize associations of producers of agricultural products.[17] The measure passed the House of Representatives with relative ease.[18] The Senate, however, amended the bill, providing for control by the FTC rather than by the Secretary of Agriculture. The House would not concur with the substitution of the FTC so legislation was postponed until the 67th Congress, when what is now known as the Capper-Volstead Act was reintroduced in the House of Representatives. Representative Volstead, floor manager of the bill, stated that the law was needed to authorize agricultural cooperatives to engage in the marketing of their members' products, an activity which was currently prohibited by the Sherman Act. The object of the bill, he said, "is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns."[19] The bill was debated on May 4, 1921, and passed by a

---

in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or, Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. And in any case to the following: Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." Section 292 provides that: "[I]f 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 [after a "show cause" hearing he may direct such association to cease and desist from monopolization or restraint of trade. This order may be enforced by the Attorney General if not obeyed by the association]."

[17] The text of the bills were substantially the same as the Capper-Volstead Act passed two years later, except that they did not contain any provision regarding the percentage of nonmember produce which a cooperative could handle. 59 CONG. REC. 6553 (1920).

[18] The Bill passed the House on May 31, 1920, by a vote of 234 to 58. 59 CONG. REC. 8040-41 (1920).

[19] 61 CONG. REC. 1033 (1921).

vote of 295 to 49.[20] During the debate a motion to recommit and strike section two (relating to control by the Secretary of Agriculture) was soundly defeated.[21]

In the Senate debates, Senator Capper re-echoed Representative Volstead's assertion that the purpose of the legislation was essentially "to give the farmer the same right to bargain collectively that is already enjoyed by corporations," and to give "consumers a protection which they do not now have as against middlemen . . . ."[22] The Senate's substitute bill was subject to considerable objection. The primary difference between it and the House bill was centered around one paragraph which would have made explicit the application to cooperatives of the monopolization prohibitions of the Sherman Act.[23]

> Nothing 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 act entitled 'An Act to create a Federal trade commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, on account of unfair methods of competition in commerce.

Senator Walsh, a strong backer of the Senate substitute, envisioned that, at the most, cooperatives would be able to form into state-wide organizations, but would not have the right to associate in any common activity with other cooperatives. This, he felt, would give agriculture bargaining power but would still prohibit monopolies of food and fiber. Senator Walsh said that the purpose of the Senate substitute was to "relieve these associations from all possible risk of being prosecuted under Section 1 of the [Sherman Act] but not under Section 2."[24] Senator Capper, among others, urged that this gave the farmers nothing. On the one hand, he said, farmers were given authorization to form monopolies, but on the other hand, they were prohibited from doing so. The result would be small weak associations which would not give the farmers an effective voice against large, corporate middlemen, thus defeating the purpose of such legislation.[25]

The Senate also posed the question of who was to enforce the supervision of agricultural cooperatives. The House measure placed

---

[20] 61 CONG. REC. 1046 (1921).

[21] 61 CONG. REC. 1045 (1921).

[22] 62 CONG. REC. 2057-58 (1922).

[23] 62 CONG. REC. 2280 (1922).

[24] 62 CONG. REC. 2123 (1922).

[25] 62 CONG. REC. 2057-61 (1922).

this authority in the Secretary of Agriculture; the Senate placed supervisory power in the FTC. Senator Norris, a leading exponent of the House version, was personally in favor of control by the FTC. He felt that location of supervision was not a question of great importance, but since the committee thought otherwise, he was willing to defer to their judgment. Senator Norris voted with the majority to reject a late amendment to transfer supervision to the FTC.[26] Senator Kellog, another backer of the House version, urged that the Secretary of Agriculture should have supervisory authority because of the facilities in the Department of Agriculture for market analysis. He asserted that under the House version:[27]

> [B]efore such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.

Senator King, a backer of the Senate substitute, said that the House version:[28]

> . . . denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.

The Senate substitute was defeated by a vote of 56 to 5.[29] Thus, the Secretary of Agriculture became the enforcing agency. The Capper-Volstead Act passed the Senate by a margin of 58 to 1.[30] The House accepted the minor changes made by the Senate by a vote of 276 to 8.[31]

From a reading of the Capper-Volstead Act and from the interpretation given it by both supporters and opponents in Congress, the intended locus of the control of agricultural cooperatives appears to be quite clear. Qualified organizations were to be immune from the antitrust laws in carrying out the objectives of the cooperatives,

---

[26] 62 CONG. REC. 2278-79 (1922).

[27] 62 CONG. REC. 2049 (1922).

[28] *Ibid.* Senator Williams, in the first session of the 69th Congress offered a similar interpretation of § 2 of the Capper-Volstead Act without challenge. He said, "[A]nd if the Secretary of Agriculture shall condemn or denounce such an association, then it becomes subject to be considered by the Department of Justice." 67 CONG. REC. 11523 (1926). See also 67 CONG. REC. 11618 (1926) (remarks of Senator Fess).

[29] 62 CONG. REC. 2281 (1922).

[30] 62 CONG. REC. 2282 (1922).

[31] 62 CONG. REC. 2455 (1922).

and the Secretary of Agriculture was to make the determination as to the existence of harmful monopolies or the undue enhancing of prices. Only in the event of noncompliance with directives of the Secretary of Agriculture was the Department of Justice to institute proceedings to enforce the Secretary of Agriculture's orders.[32]

D. SUBSEQUENT ENACTMENTS

While the Capper-Volstead Act is the foundation of the agricultural cooperative movement, Congress continued to pass legislation to aid and encourage agricultural cooperation. The course of this legislation proceeded along two paths: (1) Congress continued to legislate with regard to the antitrust laws; and (2) Congress embarked on a program of aiding agriculture by providing financial resources to cooperatives in order that they might develop into effective organs in the market place.[33] While this article is concerned with the antitrust aspects of subsequent legislation, the positive aids offered to the cooperative movement should be fully recognized.[34] This latter element of the law supplements the previous Congressional history of cooperative encouragement and evidences a continuing strong intent on the part of Congress to further the development of agricultural cooperatives.

(1) *Cooperative Marketing Act*

Congress in 1926 passed the Cooperative Marketing Act,[36] establishing a division of cooperative marketing within the Farm Credit Administration. Section 5 of the Act permits agricultural cooperatives to exchange any information relating to their activities and to make such exchanges through various agencies in common.[36]

---

[32] The Fishermen's Collective Marketing Act, 48 Stat. 1213-14 (1934), 15 U.S.C. §§ 521-22 (1958), administered by the Secretary of the Interior, is very similar to §§ 1 and 2 of Capper-Volstead. Cases arising thereunder are frequently cited in discussions involving agricultural cooperatives.

[33] Agricultural Marketing Act, 46 Stat. 11 (1929), as amended, 12 U.S.C. §§ 1141(a)-(j) (1958); Farm Credit Act, 47 Stat. 713 (1932), as amended, 12 U.S.C. §§ 1148(a)-(d) (1958).

[34] U.S. DEPT. OF AGRICULTURE, FARM COOPERATIVE SERVICE BULLETIN 10, LEGAL PHASES OF FARM COOPERATIVES 251 (1958).

[35] 44 Stat. 797 (1926), 7 U.S.C. §§ 451-57 (1958).

[36] "Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may

(2) *Agricultural Marketing Agreement Act of 1937*

While not strictly within the ambit of the antitrust exemption for agricultural cooperatives, this enactment must be considered because of its somewhat confusing reference to agricultural cooperatives and the antitrust laws: "The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States . . . ."[37] This is an enabling section giving the Secretary of Agriculture authority to carry out the purposes of the Act. The Secretary is empowered after due notice and hearing to enter into marketing agreements with "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof . . . ."[38] This provision was carried over from the Agricultural Marketing Agreement Act of 1933.

The original bill that passed the House in 1933 did not mention antitrust immunity. But the matter was later discussed in the Senate because processors wanted assurance that if they entered into agreements with the Secretary of Agriculture they would not be subject to the antitrust laws. To pacify the processors, the antitrust provision was introduced as an amendment by Senator Bankhead. Like many others, Senator Norris supported the amendment, but believed that it was not necessary.[39] In subsequent acts the antitrust immunity provision was inserted as a matter of course with no comment on its substantive aspects.

The Agricultural Marketing Agreement Act does not relate specifically to agricultural cooperatives and it is not a part of the statutory development of laws applicable to agricultural cooperatives.

---

acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them." 44 Stat. 797 (1926), 7 U.S.C. § 455 (1958).

[37] 48 Stat. 34 (1933), as amended, 7 U.S.C. § 608(b) (1958).

[38] *Ibid.*

[39] "I do not agree with them [the processors]; I think that if the authority were given to make such a contract, that would be a complete defense. Nevertheless, we must realize that the Secretary could do nothing under the terms of the bill unless he made an agreement with the packers, so we must get their consent. I see no objection, even though I do not think it is necessary, to putting into the bill a provision that the making of any such agreement shall not be held to be a violation of the antitrust laws." 77 CONG. REC. 1970 (1933). The report of the House conference managers recommended the adoption of this Senate amendment without comment. H.R. REP. No. 100, 73d Cong., 1st Sess. 8 (1933).

(3) *Section 7 of the Clayton Act*

In 1950, Section 7 of the Clayton Act was amended to bring within its coverage acquisitions of assets having stated anticompetitive effects.[40] The amended act provides that "no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation, where . . . the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[41] The Act further provides that "nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary . . . ."[42] This provision was not in the original bill as introduced in the 80th Congress. However, after a representative of the National Cooperative Milk Producers Federation testified as to the possible impacts of the proposed changes on cooperatives, the bill was amended as indicated above.[43]

(4) *Robinson-Patman Act*

The Robinson-Patman Act,[44] prohibiting price discrimination and other related monopolistic practices in restraint of trade, applies to agricultural cooperatives. This Act specifically permits cooperative associations to return net earnings or surpluses to their members in proportion to their sales through the association.[45] All other restrictions, however, apply equally to cooperatives as to other businesses.[46] Enforcement of this Act as applied to agricultural cooperatives is with the FTC.[47]

---

[40] 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

[41] *Ibid.*

[42] *Ibid.*

[43] *Hearing on H.R. 515 Before Subcommittee No. 2 of the House Committee on the Judiciary*, 80th Cong., 1st Sess. at 101-04 (1947).

[44] 49 Stat. 1526, 1528 (1936), 15 U.S.C. § 13(a)-(f), 13a, 13b (1958).

[45] 49 Stat. 1528 (1936), 15 U.S.C. § 13b (1958). This provision was a necessity to cooperatives. The very essence of cooperatives involves rebates to favored patrons, members. Without this exemption cooperatives would have been legislated out of existence.

[46] "[T]hat § 4 gives no immunity to the Co-op as an entity. It must, as would any other organization of comparable size, respect the prohibitions against discriminatory price differentials." Mid-South Distributors v. FTC, 287 F.2d 512, 516 (5th Cir. 1961).

[47] 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1958). The language of the Robinson-Patman Act clearly placing enforcement in the Federal

IV. JUDICIAL CONSTRUCTION

Having obtained favorable legislation, the next problem facing agricultural cooperatives was to ascertain just what they had achieved, if anything.[48] Litigation involving the exemption of agricultural cooperatives from the antitrust laws is relatively recent, dating from the late 1930's.[49] The decisions conclusively indicate that agricultural cooperatives are not totally immune from antitrust prosecution. In discussing what immunity cooperatives possess, it is necessary to first consider two leading United States Supreme Court decisions[50] which pervade the whole of modern cooperative law: *United States v. Borden Co.* [51] and *Maryland & Virginia Milk Producers Ass'n v. United States.*[52]

Borden involved a combination and conspiracy violation of Section 1 of the Sherman Act. The defendants were: the cooperative association of milk producers; a number of corporate milk dis-

---

Trade Commission, 15 U.S.C. § 21, is in contrast to § 7 of the Clayton Act as amended where the language places enforcement in the Secretary of Agriculture.

[48] Perhaps the only issue of concern at the time of the formulation of the Capper-Volstead Act which can be disposed of in a cursory manner is whether or not such exemption is constitutional. It is now generally conceded that agriculture may reasonably be differentiated from other segments of the economy. See Tigner v. Texas, 310 U.S. 141, 146-47 (1940).

[49] A possible explanation for this is that until 1929 the Department of Justice did not have sufficient funds to bring such actions because of riders on the appropriation bills providing that "no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products." U.S. DEPT. OF AGRICULTURE, FARM COOPERATIVE SERVICE BULLETIN 10, LEGAL PHASES OF FARM COOPERATIVES 251 (1958).

[50] A third case, United States v. King, 250 Fed. 908 (D. Mass 1916), should perhaps be mentioned. In this case an association of potatoe shippers was convicted of restraint of trade. The association sought unsuccessfully to gain immunity under § 6 of the Clayton Act. Holding that the association did not qualify as a cooperative the court in obiter dictum held that qualified cooperatives could only use methods permitted to other lawful associations. While interesting, this case is of little authoritative value and should bear no real significance in modern litigation. This is not a Supreme Court decision and it was prior to the Capper-Volstead Act and the other subsequent legislative pronouncements with regard to agricultural cooperatives.

[51] 308 U.S. 188 (1939) [hereinafter referred to as *Borden*].

[52] 362 U.S. 458 (1960) [hereinafter referred to as *Maryland and Virginia*].

tributors; a labor union and its officials; municipal officials, and two arbitrators who fixed the price of milk to be paid to the producers.

The federal district court sustained a demurrer by the cooperative on grounds that it was exempt from prosecution under Section 1 of the Sherman Act because of Section 6 of the Clayton Act, Sections 1 and 2 of the Capper-Volstead Act, and the Agricultural Marketing Agreement Act. The Supreme Court, however, held that an order issued under the Agricultural Marketing Agreement Act was not a defense when such order had terminated. In interpreting the Capper-Volstead Act the Court announced the now well known "other persons" rule:[53]

> The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with *other persons* in restraint of trade that these producers may see fit to devise.

The Court then went on to interpret Section 2 of the Capper-Volstead Act. The cooperative had defended on the ground that no prosecution could be brought until action had been taken by the Secretary of Agriculture. After indulging in confusing dicta the Court said:[54]

> But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.

Maryland and Virginia was a civil antitrust action against an agricultural cooperative marketing association composed of about 2,000 dairy farmers supplying approximately 86 per cent of the milk purchased by milk dealers in the Washington, D. C., metropolitan area. The complaint charged that the association had: (1) monopolized and attempted to monopolize interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of Section 2 of the Sherman Act;[55] (2) combined

---

[53] 308 U.S. 188, 204-05 (1939). (Emphasis added.)

[54] *Id.* at 206. The doctrine of primary jurisdiction, *i.e.* that the Court will decline jurisdiction pending action by a regulatory agency, is declining in importance. See United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715, 1736 (1963).

[55] The Cooperative had carried on a number of questionable practices including: interference with truck shipments of nonmembers' milk; an attempt during 1939-42 to induce a Washington dairy to shift non-

and conspired with Embassy Dairy and others to eliminate and foreclose competition in violation of Section 3 of the Sherman Act; and (3) purchased all assets of the Embassy Dairy, the effect of which might be to substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.[56] The federal district court dismissed the complaint as to the Section 2 violation, holding that the Capper-Volstead Act immunized an agricultural cooperative from the antitrust laws in both its existence and activities so long as it did not engage in conspiracies or combinations with nonproducers of agricultural commodities.[57] The Section 3 and Section 7 charges were permitted, and the district court found for the government.[58]

The Association's chief argument for antitrust exemption was that the Secretary of Agriculture had primary jurisdiction under Section 2 of the Capper-Volstead. To this the Court replied:[59]

Association producers to the Baltimore market; a boycott of a feed and farm supply store to compel its owner, who also owned a dairy, to purchase from the Association; and compelling a dairy which was indebted to the Association to purchase milk from the Association. 362 U.S. 458, 468 (1960).

[56] The facts supporting both the § 3 and § 7 charges were: (1) the Association had paid over $2,940,000 for fixed assets of Embassy Dairy having a value of approximately $1,600,000; (2) Embassy Dairy was the largest milk dealer in the area which competed with the Association's dealers; and (3) the owner of Embassy agreed not to compete in the Washington area for ten years and agreed to attempt to persuade the independent producers who supplied him either to sell to distributors who purchased from the Association or join the Association. Comment, 36 IND. L.J. 497, 500 (1961).

[57] United States v. Maryland & Virginia Milk Producers Ass'n, 167 F. Supp. 45, 52 (D.D.C. 1958).

[58] The district court made several findings of fact. With regard to the § 7 charge, it found that the motive and purpose of the Embassy acquisition was to: eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to Baltimore, thus bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract milk bidding; and increase the Association's control of the Washington market. United States v. Maryland & Virginia Milk Producers Ass'n, 168 F. Supp. 880, 881, (D.D.C. 1959). With regard to the § 3 charge the district court held that: the result of the transaction was a foreclosure of competition; the intent of the transaction was to restrain trade; and that an unreasonable restraint of trade, violative of the Sherman Act, had resulted from the acquisition. 362 U.S. 458, 469 (1962).

[59] 362 U.S. 458, 463 (1960).

> This Court unequivocally rejected the same contention in *United States v. Borden Co.*, after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the *Borden* opinion on this point.

The Association then argued that without regard to Section 2 of the Capper-Volstead Act, Section 1 of that Act and Section 6 of the Clayton Act demonstrated a purpose wholly to exempt agricultural associations from the antitrust laws. The Court answered this as follows:[60]

> Although the Court was not confronted with charges under § 2 of the Sherman Act in that case [*Borden*] we do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act, while making them responsible for such practices as violations of the antitrade-restraint provisions of §§ 1 and 3 of that Act. These sections closely overlap, and the same kind of predatory practices may show violations of all. The reasons underlying the Court's holding in the Borden Case that the cooperative there was not completely exempt under § 1 apply equally well to §§ 2 and 3.

The Court said that the purchase of the Embassy assets simply for business use, without more, was lawful; however, viewed in its complete setting, the purchase was to restrain and suppress competitors and competition in the Washington metropolitan area. The Court concluded:[61]

> We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.

With *Borden, Maryland and Virginia,* and the legislative setting in mind, this article turns to an examination of cooperative immunity and specific cooperative activities and their actual or probable legality.

A. Regulation of Cooperatives—Jurisdiction & Immunity

Immunity of agricultural cooperatives from the antitrust regulations is a relative rather than an absolute term. Certainly no one will contend that agricultural cooperatives are free from every type of regulation. The issue is to what extent agricultural cooperatives have been removed from the operations of the antitrust laws and placed under a separate regulatory authority. There are two op-

---

[60] *Ibid.*

[61] 362 U.S. 458, 472 (1960).

posing views on the issue, the cooperative position and the position of the Department of Justice.

Cooperatives do not insist that the Secretary of Agriculture has exclusive jurisdiction over all cooperative activities. They are willing to follow the *Borden* decision that the Secretary of Agriculture and the Justice Department have *concurrent* jurisdiction whenever cooperatives combine with nonagricultural interests. When the activity is solely within a cooperative, they insist that exclusive jurisdiction is under the Secretary of Agriculture.[62]

The Justice Department believes that its jurisdiction is all-encompassing. The Department asserts that action by the Secretary of Agriculture is an alternative or additional means of antitrust regulation of cooperatives, and that exclusive jurisdiction is not vested in the Secretary of Agriculture.[63] The Justice Department places primary reliance upon *Borden* to sustain this view.[64]

Considering the intention of Congress[65] and a full reading of

---

[62] Brief for Defendant, pp. 42-44, Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

[63] Address by Robert A. Bicks, First Assistant, Antitrust Division, Department of Justice, at Conference of National Council of Farmer Cooperatives, New Orleans, Louisiana, Jan. 14, 1959. See also Note, 44 VA. L. REV. 63, 67 (1958).

[64] The Department of Agriculture occupies somewhat of a middle ground in this jurisdictional controversy, although it appears to be firmly committed to aiding in the growth of the cooperative movement. The Department seeks to clarify the existing legal position of cooperatives. In 1961 the Department of Agriculture sought to have included in the Agricultural Act of 1961 a section which provided that farmer cooperatives could acquire assets of other cooperatives or noncooperative business firms unless the effect of such action would tend to lessen competition or create a monopoly. After the bill was introduced, attempts were made to amend this section to give farmer cooperatives the statutory right, if they wished, to exercise a pre-merger review before the Secretary of Agriculture. However, this incurred the opposition of the Department of Justice and as finally enacted the Act contained no provision regarding cooperatives. See Address of Raymond J. Mischler, Office of the General Counsel, United States Department of Agriculture, 45th Annual Convention of the National Milk Producers Federation, Seattle, Washington, Nov. 8, 1961.

[65] The conference report on the Agricultural Act of 1961 said that the provision with regard to cooperatives was omitted because it was considered unnecessary and a "mere restatement of existing law." The report concludes: "The committee of conference hereby reaffirms, consistent with the policy embodied in the Capper-Volstead Act, the Cooperative Marketing Act of 1962 [sic-1926]. The Agricultural Marketing Act of 1929, as amended, the Farm Credit Act of 1933, as amended,

the *Borden* decision, it appears that the cooperative position can be more effectively supported. *Borden* denies to the Secretary of Agriculture exclusive jurisdiction only when cooperatives exceed their exemption. *Maryland and Virginia* reaffirms *Borden* and adds the "legitimate object" test to the "other persons" test.

The jurisdictional problem need not be confusing. A division of jurisdiction consistent with the legislative intent, statutes, and recent decisions is possible. This would place jurisdiction under the Secretary of Agriculture to regulate all cooperative organizations and activities except when a cooperative combines or conspires with other persons, discriminates in prices, or uses coercive methods denied to other business entities. In these situations the cooperative would be subject to the full impact of the antitrust laws. Such a division would be consistent with the present public policy of aiding agriculture in gaining economic parity, but would not give agriculture special privileges or a license to prey upon the consumer. Unlike normal business activities which have no supervision if permissible methods are employed, agricultural cooperatives would still be subject to additional control by the Secretary of Agriculture —a further safeguard against possible abuse.

While such an allocation of jurisdiction might be desirable and workable, the practical question remains as to what the Supreme Court will do. The key to the Court's approach is probably found in *United States v. Philadelphia Nat'l Bank*,[66] applying Section 7 of the Clayton Antitrust Act to bank mergers.

The Court rejected the defendant's arguments that the Bank Merger Act,[67] by directing the banking agencies to consider competitive factors before approving a merger, immunized the defendant from the antitrust laws. No expressed immunity was found to have been conferred by the act as is conferred by similar legisla-

---

and related legislation, the national policy of aiding and encouraging the organization, operation, and sound growth of farmer cooperatives to the end that farmers of the Nation may through group action conduct their business operations effectively to obtain a fair share of the Nation's income. The committee of conference construes existing provision of law to mean that two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform." H.R. REP. No. 839, 87th Cong., 1st Sess. 37 (1961).

[66] 83 Sup. Ct. 1715 (1963).

[67] 12 U.S.C. § 1828 (Supp. IV, 1963).

tion.[68] In the absence of expressed immunity, repeal of the antitrust laws by regulatory statute is "strongly disfavored."[69] Repeal by implication, the Court said, is only found in ". . . cases of plain repugnancy between the antitrust and regulatory provisions."[70] Citing *Pan American World Airways v. United States*,[71] the Court sets forth what it considers essential to repeal by implication: expressed immunity provisions plus power to enforce a competitive standard.[72]

A similar line of reasoning was set forth in *Silver v. New York Stock Exch.*,[73] where the test for repeal by implication is whether or not repeal is necessary to make the regulatory statute work and then only to the minimum extent necessary.[74] The Court in *Silver* then considers whether or not there is anything "built into the regulatory scheme which performs the antitrust function . . . ."[75] An additional requirement of repeal by implication appears to be that such regulatory scheme must provide adequate hearing opportunities and a system of judicial review.[76] The requirements for antitrust immunity as set forth in *Philadelphia Nat'l Bank* and *Silver* appear to be (1) expressed immunity or (2) clearly implied immunity, a hearing and judicial review procedure, and powers to enforce substituted standards of competition.

The Court has determined that the Capper-Volstead Act does not grant an expressed immunity to agricultural cooperatives. The implied immunity argument for agricultural cooperatives has not elicited favorable response from the Court. The overall statutory scheme, it reasonableness and fairness, and its legislative history expressing the continuing clear intent of Congress has been argued

---

[68] Federal Aviation Act, 49 U.S.C. § 1384 (1958); Federal Communications Act, 47 U.S.C. §§ 221(a), 222(c)(1) (1958); Interstate Commerce Act, 49 U.S.C. §§ 5(11), 5b(9), 22 (1958); Federal Maritime Act, 46 U.S.C. § 814 (Supp. IV, 1963); Webb-Pomerene Act, 15 U.S.C. § 62 (1958).

[69] United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715, 1734 (1963).

[70] *Id.* at 1735.

[71] 371 U.S. 296 (1963).

[72] It would appear that such a standard must be delineated by Congress. See 83 Sup. Ct. at 1735.

[73] 83 Sup. Ct. 1246 (1963).

[74] *Id.* at 1257.

[75] *Id.* at 1258.

[76] See United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715, 1735 (1963); Silver v. New York Stock Exch., 83 Sup. Ct. 1246, n.12 (1963).

to the Court and rejected.[77] Where does this leave agricultural cooperatives? If the Court will not accept the jurisdictional division as discussed above,[78] then cooperatives must turn to Congress for a clear mandate if they wish to be immunized from the antitrust laws.

Until such times as agricultural cooperatives are given immunity from the antitrust laws it is necessary to consider whether particular activities are violative of the antitrust laws.

B. Cooperative Activities with Noncooperatives

Perhaps the most immutable area of cooperative law is that dealing with the combination of cooperatives and nonagricultural entities. Such combinations, if conspiratorial in nature, are uniformly condemned. *Borden* established the law in this area with its "other persons" rule. However, *Borden* was concerned only with a charge brought under Section 1 of the Sherman Act. In *Maryland and Virginia* the Court extended *Borden* to include "legitimate objects" as well as "other persons." The Court held that the reasoning of *Borden* with regard to Section 1 violation of the Sherman Act applied equally well to Sections 2 and 3.[79]

To what extent may a cooperative contract with "other persons"? The Capper-Volstead Act provides that "such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."[80] The only agreements which are questioned are exclusive dealing, exclusive handling, full supply contracts, and refusals to deal, all of which are easy tools with which to effect a monopoly.

Refusals to deal on the part of cooperatives do not appear to be illegal per se, though there are no holdings on this particular issue. However, if the refusal to deal is accompanied by any motive to restrain trade, the Court will require commercial motive, business pattern, and "reasonable" conduct to uphold the practice. As a general rule the cooperative should have a strong and valid reason when it refuses to deal. A refusal to deal for any anticompetitive reason would probably be held to be outside the legitimate objectives of a cooperative. Even a simple refusal to deal may not be tolerated when an examination of the market context is made, even though the refusal has some justification.[81]

---

[77] See text discussion at note 55 *supra.*

[78] See text discussion at note 62 *supra.*

[79] 362 U.S. 458, 463 (1960).

[80] 42 Stat. 388 (1922), 7 U.S.C. § 291 (1952). (Emphasis added.)

[81] Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 136 (1955).

Exclusive dealing and handling and full supply contracts have a varied judicial history. Two early cases[82] appeared to condemn such activities, however, a subsequent case[83] is contra in rationale. While the Supreme Court has never determined this issue as applied to agriculture, it is suggested that these practices will not stand up under *Maryland and Virginia*. Not only must these contracts meet the reaffirmed *Borden* test, but they must meet the "legitimate objects" test. Under the latter test the Court minutely examines the intentions as well as the methods of the cooperative. It is very possible that the Court may make such contracts per se violations—outside the immunity of Capper-Volstead and Section 6 of the Clayton Act.

(1) *Combinations and Conspiracies between Related Cooperatives*

In *United States v. Maryland Coop. Milk Producers*,[84] two incorporated milk producers' associations were charged with an unlawful combination and conspiracy to fix prices of milk sold by them to distributors supplying a military post. Judge Holtzoff, after holding that agricultural cooperatives were entirely exempt from the antitrust laws, went on to say that it was immaterial whether farmers chose to organize in one or several groups. The effect of their actions was the same. Judge Holtzoff pointed out that not only did a literal interpretation of Section 6 of the Clayton Act support this view, but that the Capper-Volstead Act and the Cooperative Marketing Act added further affirmative support to this conclusion.[85]

The Justice Department quite characteristically does not share

---

[82] These two cases were brought under the Fishermen's Collective Marketing Act, see note 31 *supra*. In Columbia River Packers Ass'n v. Hinton, 34 F. Supp. 970, 974 (D. Ore. 1939), the court found a *Borden* situation and said that neither fishermen's nor farmer's cooperatives "having substantial control of production in their given field, could require of all buyers that they agree not to buy from any other producer." In Manaka v. Monterey Sardine Indus., 41 F. Supp. 531 (N.D. Cal. 1941), a fisherman was allowed damages from a fish canner and a cooperative association of boat owners where the full supply contract was part of a conspiracy to prevent plaintiff, a nonmember of the cooperative from fishing and marketing his catch.

[83] In Maryland & Virginia Milk Producers Ass'n v. United States, 193 F.2d 907 (D.C. Cir. 1951), *reversing* 90 F. Supp. 681 (D.D.C. 1950), a full supply contract between the cooperative which supplied 80 per cent of the milk in a certain market and two nonagricultural distributors was upheld.

[84] 145 F. Supp. 151 (D.D.C. 1956).

[85] *Id.* at 52-55.

the view of Judge Holtzoff. One of the Department's leading spokesmen said, "It is the position of the Antitrust Division that agreements between cooperatives to destroy competition, to divide markets, to fix prices, or to limit production, would be illegal."[86]

After this "stinging defeat" in *United States v. Maryland Coop. Milk Producers,* the Justice Department "unleased an attack" to clarify the position of cooperatives under Section 2 of the Sherman Act.[87] The attack vehicle was *Maryland and Virginia.* But this case has limited applicability to intercooperative activities because it involved a cooperative and a noncooperative engaging in predatory practices. Indulging in dictum the Court said:[88]

> We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.

The Court's footnote to this simply says, "See *United States v. Maryland Cooperative Milk Producers, Inc.* 145 F. Supp. 151."[89] By this dictum the Court *may* be indicating that it will hold intercooperative activity to be a per se violation of the antitrust laws. It will be truly unfortunate if this is done. Not only will the Court have to ignore the language and intent of the Clayton Act, the Capper-Volstead Act, and the Cooperative Marketing Act (as discussed by Judge Holtzoff) but it ignores the fact that Congress, in Section 2 of Capper-Volstead, provided a method for controlling such activities when they become injurious to the public. On the other hand, the dictum of the Court may well mean that it will apply the "legitimate object" test used in *Maryland and Virginia,* and proceed on a case by case basis in examining the intent and means used by cooperatives in their relations with other cooperatives, striking down predatory practices.

(2) *Cooperative Federations*

A major question has been whether agricultural cooperatives may form federations which become centralized marketing agencies.

---

[86] Address by Stanley N. Barnes, Assistant Attorney General of the Antitrust Division, before the American Institute of Cooperation, Columbia, Missouri, Aug. 10, 1953. Mr. Barnes' successor, Robert A. Bicks echoed this proposition in an address delivered to the Agricultural Marketing Conference, Ohio State University, Columbus, Ohio, Dec. 8, 1960.

[87] Note, 44 VA. L. REV. 63, 83 (1958).

[88] 362 U.S. 458, 472 (1960).

[89] *Id.* at 472, n.23.

The Capper-Volstead Act does not mention federations as such, but would appear to permit such organizations.[90] The Cooperative Marketing Act provided that the Division of Cooperative Marketing should render service to:[91]

> *associations of producers* of agricultural products, *and federations and subsidiaries thereof,* engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities.

Legal commentators have also expressed the view that federations are a permissible form of cooperate activity.[92]

This question was finally answered in the affirmative by the Supreme Court in *Sunkist Growers v. Winckler & Smith Citrus Prods. Co.*[93] The suit was a private action for damages charging that the defendants conspired, combined, and monopolized trade to the damage of the plaintiffs. The operational organization of the defendants is concisely set forth by Mr. Justice Clark in the unanimous opinion of the Court:[94]

> [T]he individual growers involved each belong to a local grower association. Fruit which is to be sold fresh is packed by the associations and marketed by Sunkist, a nonstock membership corporation comprised of district exchanges to which the associations belong. Most fruit which is to be processed into by-products is handled by Exchange Orange, a subsidiary of Sunkist, or by Exchange Lemon, a separate organization comprised of a number of Sunkist member associations. It is then marketed by the products department of Sunkist which is managed by directors of Exchange Orange and Exchange Lemon.

The Court granted certiorari limited to the issue of immunity from the conspiracy provisions of the antitrust laws of the inter-

---

[90] The Attorney General said: "Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act through centralized marketing agencies in disposing of the products of their members, and that they should, in representation of their members, hold stock in such centralized marketing agencies; I can not doubt, in view of the purposes of the Capper-Volstead Act, that such methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute. 36 OPS. ATT'Y GEN. 326, 339-40 (1930).

[91] 44 Stat. 802 (1926), 7 U.S.C. § 453(a) (1958). (Emphasis added.)

[92] See Mischler, *Agricultural Cooperative Law,* 30 ROCKY MT. L. REV. 381 (1958); ATT'Y GEN. NAT'L COMM., ANTITRUST LAWS REP. 308 (1955); Jensen, *The Bill of Rights of U.S. Cooperative Agriculture,* 20 ROCKY MT. L. REV. 181 (1948).

[93] 370 U.S. 19 (1962).

[94] *Id.* at 22.

organization dealings among the three cooperatives. The Court held that "the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities."[95]

The federation of agricultural cooperatives now rest upon a sound legal foundation. All agricultural associations, however, do not have a carte blanche to federate. The *Sunkist* decision has two significant limitations. First, it does not extend to all cooperative federations. From the facts of the case and the language of the Court it is apparent that federated cooperatives must be in the same or similar lines of production.[96] Secondly, the Court indicates that the mode of operation of the federation might be a pivotal factor. "There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations."[97]

(3) *Cooperative Acquisitions and Mergers*

The law as to acquisitions by cooperatives appears to be settled by *Maryland and Virginia* where the Court held that Section 7 of the Clayton Act[98] applies to cooperatives as well as to other business enterprises. Section 7 provides that whenever the acquisition of all or any part of a competitor may tend to create a monopoly or substantially lessen competition, such acquisition is a violation of the antitrust laws.[99] The Court held that the provision of Section 7 giving the Secretary of Agriculture jurisdiction had no effect because "there is no 'statutory provision' that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case."[100]

---

[95] *Id.* at 29.

[96] Thus the Court, although it permitted a citrus fruit federation, would probably look askance on a federation composed of citrus fruit and poultry or potato cooperatives.

[97] 370 U.S. 19, 29 (1962).

[98] 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

[99] The vertical effect of an acquisition need not extend to the creation of a monopoly in order for it to come under judicial scrutiny. See A. G. Spalding & Bros. v. FTC, 301 F.2d 585, 624 n.31 (3rd Cir. 1962).

[100] 362 U.S. 458, 469 (1960). However, § 2 of the Capper-Volstead Act (note 18 *supra*) contemplates the creation and existence of cooperative monopolies without any form of regulatory consent, only sanctions if the monopoly power is misused so as to unduly enhance prices.

Maryland and Virginia involved the acquisition of a noncooperative competitor. Will the rule be the same in the event that a cooperative seeks to acquire a cooperative competitor? It will be strongly argued that *Maryland and Virginia* prohibits such acquisition. However, since an acquisition has the characteristics of and is treated as a merger,[101] the decision may depend on the ultimate determination of whether or not the Court's interpretation of Section 7 in *Maryland and Virginia* applies to cooperative mergers and consolidations, or is limited to a cooperative acquiring or mergering with a noncooperative.

Since under *Sunkist,* cooperatives may federate and may have marketing agencies in common, it would appear that they should likewise be permitted to merge. The effect of a merger in lessening competition or tending to create a monopoly would be no different from that of a federation.

If the Secretary of Agriculture has no statutory authority to approve an acquisition, may he approve mergers? It should be noted that the Court in *Maryland and Virginia,* in discussing the authority of the Secretary of Agriculture, limited its language to the "circumstances of this case."[102] The language of Section 2 of Capper-Volstead indicates that Congress was not primarily concerned with mergers of cooperatives or even the forming of cooperative monopolies. Congress recognized that such monopolies might exist and, in Section 2, provided a method whereby the public interest would be protected. Since the Secretary of Agriculture has statutory power to regulate such monopolies, the provision in Section 7 of Clayton giving the Secretary primary jurisdiction should be applicable. This is a valid distinction if the Court adheres to the rule that the Secretary of Agriculture has exclusive jurisdiction when cooperatives do not deal with other persons or follow practices outside of the legitimate object of cooperate existence.

Unfortunately for the cooperative movement, the law on cooperative mergers is unsettled. Authoritative pronouncements can

---

[101] While the § 7 language is in terms at asset-acquisition the Court in United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715, 1729-34 (1963), held that mergers were included in the amended § 7. And in addition the Court limited the specific exception portion of § 7, ". . . the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only asset acquisitions by such corporations when not accomplished by merger."

[102] *Id.* at 470.

only be issued by the Court or Congress. Until such time, cooperatives must run the risk of antitrust prosecution.[103]

D. INTRACOOPERATIVE ACTIVITIES

Before the refinements of cooperative law come into play the individual cooperative must qualify under Section 1 of Capper-Volstead for such cooperative immunity as may exist. Three requirements must be met: (1) No member of the association is allowed more than one vote because of the amount of stock or membership capital he may own. (2) The association must not pay dividends in excess of 8 per centum per annum. (3) The association must not deal in the products of nonmembers to an amount greater in value than are handled by it for members.[104]

Before the above three qualifications may be considered, the composition of the cooperative must conform to Section 1 of the Capper-Volstead Act. The cooperative must consist of "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ."[105] The Supreme Court has not defined who constitutes a "farmer." Judge Holtzoff, however, in the district court opinion in *Maryland and Virginia* applied a liberal interpretation which was not considered by the Supreme Court in its opinion. Judge Holtzoff held that a farmer under the Capper-Volstead Act could either be a natural person or a corporation and that it was immaterial whether every member of the association personally works on his farm. He said, "[W]hen Congress desired to put a more circumscribed definition on the term 'farmer' it did so expressly, as is true of the Bankruptcy Act . . . ."[106] This definition would appear to be consistent with the legislative intent of Congress. However, any person who thus qualified as a "farmer" would be immune from the antitrust laws only to the extent that his activities stemmed from his farming operation and were conducted under the auspices of a qualified cooperative.

There are several areas of activity of a qualified cooperative which may or may not be in restraint of trade. The crucial con-

---

[103] If § 7 does not apply to cooperatives then the merger would only be illegal under § 2 of the Sherman Antitrust Act. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[104] Judge Holtzoff in the district court opinion in *Maryland and Virginia* held that a cooperative to qualify must meet number three and either number one or number two. 167 F. Supp. 45, 50 (D.D.C. 1958).

[105] See note 16 *supra*.

[106] 167 F. Supp. 45, 49 (D.D.C. 1958).

sideration is whether or not they are legitimate objectives of the cooperative. The objectives of such cooperatives are to collectively process, handle, and market the products of their members. These activities may not be carried out in conjunction with other persons *(Borden)*, or employ the use of predatory methods as in *Maryland and Virginia*. The following activities are of particular significance: ownership of facilities; monopolization by a single cooperative; extent of market control; exclusive dealing contracts with members; and production controls.

(1) *Ownership of Facilities*

A cooperative owning its own facilities would clearly appear to be protected by the Capper-Volstead Act. As stated in the Act, cooperatives have as their purpose the collective processing, handling and marketing of the products of their members.[107] However, the Attorney General's National Committee to Study the Antitrust Laws sounded a negative warning when it said, "[O]wnership by marketing agencies of manufacturing and processing subsidiaries, seems less certain [of protection]."[108] This caveat is contrary to the established law[109] and contrary to established cooperative practices. A reading of the statute, even without consideration of the history and intent of Congress, clearly indicates that ownership of processing facilities is not only permitted but encouraged. This statement of the Attorney General's Committee should be ignored.

(2) *Monopolization by a Single Cooperative*

In *United States v. Dairy Co-op. Ass'n*,[110] a milk producer cooperative and ten of its officers and employees were charged with combining and conspiring to monopolize milk production and distribution in Portland. It was charged that they conspired to force producers to appoint the cooperative as their bargaining agent.

---

[107] See note 16 *supra*.

[108] ATT'Y GEN. NAT'L COMM., ANTITRUST LAWS REP. 308 (1955).

[109] The Attorney General has ruled: "This language [Capper-Volstead § 1] fairly imports that such producers, for such purposes, may cooperate through any organization, incorporated or unincorporated, for the accomplishment of the purposes stated, so long as the only persons interested in the organization are producers, and its operations are conducted solely for their mutual benefit. The statute imposes no restriction upon the business forms of cooperation and association which may be employed to effectively organize cooperative associations of agricultural producers for handling and marketing their products." 36 OPS. ATT'Y GEN. 326, 339 (1930).

[110] 49 F. Supp. 475 (D. Ore. 1943).

Judge McColloch dismissed the case in a terse one-page opinion. Relying upon Section 6 of the Clayton Act he said, "[I]t seems to me when Congress said that cooperatives were not to be punished, even though . . . monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions."[111] Judge McColloch did not consider the *Borden* decision. The facts did not present a *Borden* situation because in *Dairy Co-op.* no persons other than those in the cooperative were involved.

In *United States v. Maryland and Virginia Milk Producers Ass'n,*[112] Judge Holtzoff held that a cooperative was not liable for a violation of Section 2 of the Sherman Act. He said:[113]

> [T]he Court is of the opinion that an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities.

But in *April v. National Cranberry Ass'n,*[114] another federal court felt that Judge Holtzoff reached his conclusion far too readily. The court said:[115]

> In the absence of specific language in the act to the contrary, I hold that when Capper-Volstead provided that a cooperative and its members were not to be prohibited from 'lawfully carrying out the legitimate objects thereof' . . . at least it did not make lawful purely predatory practices seeking to monopolize, forbidden to an individual corporation, nor did it deprive the victims of such practices effected with monopolizing intent of their private right of action under section 4 of the Clayton Act.

Maryland and Virginia, modifying Judge Holtzoff's decision, has resolved this conflict. The Supreme Court followed the reasoning of *April* in announcing that the same predatory practices could constitue violations of Sections 1, 2, and 3 of the Sherman Act, and that practices which were not a legitimate object of the cooperative constituted predatory practices which would make the cooperative liable.[116]

This conclusion is not in conflict with the reasoning of *Sunkist. Sunkist* held only that a combination of related cooperatives was

---

[111] *Ibid.*

[112] 167 F. Supp. 45 (D.D.C. 1958).

[113] *Id.* at 52.

[114] 168 F. Supp. 919 (D. Mass. 1958).

[115] *Id.* at 923.

[116] See discussion at note 60 *supra.*

not in and of itself unlawful. And the court indicated that predatory practices under such an organization would not be tolerated.[117]

(3) *Extent of Market Control*

How much of a given market may the cooperative acquire?[118] Judge Wyzanski's statement in his charge to the jury in *Cape Cod Food Prods. v. National Cranberry Ass'n*[119] is the only expression of the law on this point. He said:[120]

> Hence, it is not a violation of the Sherman Act or any other anti-trust act for a Capper-Volstead cooperative to acquire a large, even a 100 per cent, position in a market if it does it solely through those steps which involve a cooperative purchasing and cooperative selling.
>
> On the other hand, it would be a violation of the law, and it would be a prohibited monopolization for a person or group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, *or through a predatory practice, or through the bad faith use of otherwise legitimate devices.*

While such a rule has harsh connotations, it is not unreasonable or against public policy. If the cooperative should use any illegal means, it would be under the jurisdiction of either the FTC or the Justice Department. And, in any event, the Secretary of Agriculture (under Section 2 of the Capper-Volstead Act) has adequate authority to protect the consumer. Because of the power of the Secretary of Agriculture, there would appear to be no reason to use an

---

[117] An ominous warning is sounded by Mr. Justice White in Continental Ore Co., 370 U.S. 690, 709, n.14 (1962), where he cites *Maryland and Virginia* as one of the cases in which the court has condemned unilateral monopolization. If this is correct then the Court has rewritten the Capper-Volstead Act, deleting the intent of Congress to give cooperatives the ability to become economically competitive. But, Mr. Justice Stewart in his dissent in Silver v. New York Stock Exch., 83 Sup. Ct. 1246, 1264 n.5 (1963) cited *Maryland and Virginia* for the proposition that the cooperative was subject to the antitrust laws because it used its power to monopolize.

[118] In considering the question of market control it is necessary to keep in mind the "relevant market" concept which considers cross elasticities and the interchangeability of alternative products. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956). In addition the geographical area on which there is an impact is significant. See United States v. Philadelphia Nat'l Bank, 83 Sup. Ct. 1715 (1963).

[119] 119 F. Supp. 900 (D. Mass. 1954).

[120] *Id.* at 907. (Emphasis added.)

arbitrary percentage test as suggested by Judge Learned Hand in the *Alcoa* case.[121]

(4) *Exclusive Dealing Contracts with Members*

Cooperatives do not run afoul of the antitrust laws when they make exclusive dealing contracts with their members, so long as such contracts have reasonable time limitations and provide reasonable opportunities for members to terminate their agreements. However, such contracts must be drafted within the framework of the state law under which the cooperative is organized.[122]

(5) *Production Controls*

Production controls by a cooperative are to be used with extreme caution. It is apparently the opinion of the Justice Department that any agreement among members of a cooperative to limit production or destroy crops in the field would be illegal.[123] This belief is based upon *United States v. Grower-Shipper Vegetable Ass'n of Cent. California.*[124] It is argued that only the state or federal government has power to restrict production, and that when Congress provided for restriction of production in the Agricultural Marketing Act, it provided specifically that such action would not violate the antitrust laws. There is no authoritative decision on this question of production controls. If cooperatives are prohibited from such action, however, this will lead to incongruous results. It would have the courts become the planners of agricultural production, even though no other business can be compelled by the

---

[121] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). For a critical examination of this case see Levi, *A Two Level Anti-Monopoly Law*, 47 NW. U.L. REV. 567 (1952).

[122] For a general discussion of contract requirements see U.S. DEP'T OF AGRICULTURE, FARM COOPERATIVE SERVICE BULLETIN 10, LEGAL PHASES OF FARM COOPERATIVES 251 (1958).

[123] Address by Lyle L. Jones, Chief, San Francisco Office, Antitrust Division, U.S. Department of Justice, before the Agriculture Cooperative Council of Oregon, Portland, Oregon, December 5, 1960; Address by Stanley N. Barnes, Assistant Attorney General of the Antitrust Division, before the American Institute of Cooperation, Columbia, Missouri, Aug. 10, 1953; Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 51 (1960).

[124] Civil Action No. 30561, N.D.Cal., *affirmed.* The Government was granted a preliminary injunction restraining the defendants from destroying the lettuce crop pursuant to any agreement with any grower or shipper of lettuce. Subsequently, the court dismissed the case as moot in view of the fact that the agreement, which related to the 1951 crop, had expired, 344 U.S. 901 (1952).

courts to produce. Furthermore, cooperatives would be encouraged to evade the law by such methods as: putting a high standard on the produce which will be sold; by not providing enough processing, handling, or storage facilities; or by setting the price of the commodity to be sold at such a level that demand will be reduced and the perishable product rendered worthless. The policy argument for declaring such activity illegal is that the law should not permit practices which are detrimental to the consumer. But why should there be one rule for agricultural products, and another for whiskey, drugs, oil, steel, or automobiles? Adequate legal safeguards are already available. Under Section 2 of the Capper-Volstead Act the Secretary of Agriculture can issue an order compelling the cooperative to refrain from any practices which unduly enhance prices to the consumer.

(6) *Cooperative Related Activities*

May a cooperative remain exempt and own extensive handling, processing, and marketing facilities such as canneries, mills, packing plants and truck lines?

The size of a cooperative's operation should not be a consideration unless Congress passes specific legislation to that effect. The test should be the nature of the activity.[125] If the products handled are the same as those produced by the cooperative members, and at least 51 per cent of the actual amount handled is raised by members, then the cooperative should be permitted to handle, process and market to its best economic advantage. To hold otherwise would place a limitation on the Capper-Volstead Act not intended by Congress.

Congress certainly did not intend to grant cooperatives a free rein, however, to enter commercial activities clothed in immunity. Therefore, the Court may be called upon to set the bounds of cooperative activity. A possible result would be that once a cooperative's activities go beyond processing and delivery to terminals, the cooperative would be limited to handling products of its members only. Or the Court may limit cooperatives to delivery within their own geographical area. A better solution, in the absence of

---

[125] One of the applicable tests should certainly be whether the cooperative was operating for the mutual benefit of the grower members. This test applied in Florida Citrus Mut., 53 FTC 973, 985 (1957), where the cooperative operated for the benefit of the handlers and processors as well as its grower members. The cooperative was held not to be within the provisions of the Capper-Volstead Act because it was not operated for the mutual benefit of its grower members as such.

Congressional action, would be to apply the reasoning of *Maryland and Virginia,* recognize that the practices are legitimate objects of cooperative activity, and inquire into their genuineness.

IV. CONCLUSION

The law relative to agricultural cooperatives can be succinctly described by one word—*uncertainty.* Agricultural cooperatives are in the anomalous situation of not knowing what is right or wrong. As a consequence, they are faced with a continual threat of costly criminal and civil prosecutions. It is undesirable public policy to place any societal group in a position where it must risk extensive litigation in order to determine its rights.

What may be drawn from the law as it stands today? *First,* cooperatives may not combine or conspire with "other persons." *Secondly,* a limited exclusive jurisdiction by the Secretary of Agriculture may exist, but the cost of proving the point in the courts may be prohibitive. *Thirdly,* despite the fact that *Maryland and Virginia* involved a cooperative-noncooperative situation, all cooperatives will be put to the nebulous "legitimate object" test of *Maryland and Virginia. Fourthly,* federated cooperative activity is permissible subject to limitations on the method and the genuineness of the federation. However, cooperative combinations and mergers are at best open invitations to litigation. *Fifthly,* Section 7 of the Clayton Act applies to cooperative acquisitions of noncooperative competitors, and the Secretary of Agriculture has no jurisdiction relative thereto.

The cooperative picture is not entirely dismal. There are significant areas in which cooperatives have a sound legal basis. There are no restrictions on the existence of cooperatives organized under the Capper-Volstead Act. Cooperatives may carry on essential marketing activities including handling and merchandising. A cooperative may act as the sole bargaining agent for all of its members. And cooperatives may join together into federations, forming central marketing agencies for multiple local cooperatives, such as Sunkist Growers, Inc. which pools the produce of over 12,000 lemon and orange growers in Arizona and California. But in any cooperative undertaking the cooperative must first qualify under Section 1 of the Capper-Volstead Act and Section 6 of the Clayton Act, and then meet the "other persons" and "legitimate object" tests. Predatory practices are rightly forbidden to cooperatives. If a cooperative misuses or violates the term of its exemption, then the cooperative is subject to antitrust action in the same manner as any other business enterprise.

However, a significant portion of the rights and liabilities of cooperatives is uncertain. These rights and liabilities can be clarified either by Congress or the courts. Until Congress acts, skirmishes will continue between cooperatives and the Justice Department which the Court will be called upon to settle.

The Court should accept the proposition that legislation and the setting of public policy is a function of Congress, not of administrative agencies or the courts. Once this hurdle is cleared, judicial decisions will involve an interpretation of statutes in their legal and legislative setting. As to present case law, the Court is really only concerned with three decisions—*Borden, Maryland and Virginia,* and *Sunkist. Maryland and Virginia* should be limited to its facts, and the needless dicta ignored. The Court should adopt the rule that all intra- and intercooperative activities of qualified cooperatives are immune from the antitrust laws except those which constitute predatory practices forbidden to other business entities. Federations, mergers and combinations between cooperatives should be permitted. At the same time vitality should be breathed into Section 2 of the Capper-Volstead Act. The Secretary of Agriculture should be given exclusive jurisdiction over all cooperative activities as such. *Borden* would then apply to all cooperative-noncooperative practices and to all predatory practices, where the Secretary of Agriculture and the Department of Justice would have concurrent jurisdiction. Such a rule would be consistent with the intent of Congress in regard to cooperatives and would provide a reasonable solution to both the encouragement and control of agricultural cooperatives.

William E. Peters '64