An Agricultural Law Research Article

Antitrust –Agricultural Cooperatives –The Clayton Act and the Capper Volstead Act Immunized the Concerted Price Bargaining Activities of Two Agricultural Cooperatives from Antitrust Liability

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ANTITRUST-AGRICULTURAL CcX>PERATIVES-'fHE CLAYTON ACT AND THE CAPPER-VOLSTEAD ACT IMMUNIZE THE CONCERTED PRICE-BARGAINING ACTIVITIES OF Two AGRICULTURAL COOPERATIVES FROM ANTITRUST LIABILITY. *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.,* 497 F.2d 203 (9th Cir.) , *cert. denied,* 95 S. Ct. 314 (1974).

In an action arising from the negotiation of preseason contracts for the sale of potatoes, plaintiff growers! charged defendant processing firms with agreeing to fix preseason contract prices and with monopolizing or attempting to monopolize the relevant market in violation of sections 1 and 2 of the. Sherman Act.[2] Defendants counterclaimed that the growers' bargaining associations, in their tacit agreement to seek similar prices,[3] had combined and conspired in restraint of trade. Dismissing the processors' counterclaim, the district court ruled that Treasure Valley and Malheur Potato Bargaining Associations had not

1. Originally, Treasure Valley and Malheur Potato Bargaining Associations were plaintiffs in the suit. The district court, however, dismissed them for lack of capacity to sue since the bargaining associations did not sell potatoes. Plaintiffs were the individual potato growers who composed the two bargaining associations. The associations remained as cross-defendants on the counterclaim.

2. IS U.S.C. §§ 1,2 (1970).

3. Plaintiffs and defendants generally bargained in the following manner. Initially, Malheur bargained with Ore-Ida. After Malheur and Ore-Ida had reached an agreement, Treasure Valley sought the same terms in its negotiations with Ore-Ida. Correspondingly, Treasure VaHey negotiated an agreement with Simplot, the other defendant processing firm, and Malheur sought the same agreement. Having negotiated the first contract, defendants would refuse to give better terms in subsequent contracts that year, and the bargaining cooperatives would not accept worse terms.

violated Sherman Act proscriptions.[4] *Affirmed.* The Clayton Act[5] and the Capper-Volstead Act[6] immunize from antitrust liability an agreement between agricultural cooperatives to seek similar prices in contract negotiations.

During the late nineteenth century, as business and industrial growth spawned an increasingly competitive climate, farmers responded by joining together to market their produce more effectively. In 1890 when Congress first legislated to curb some of the predatory practices of an expanding industrial complex, it failed to exempt these cooperative associations of farmers.[7] Consequently, agricultural cooperatives were often prosecuted in state courts for monopolistic or conspiratorial activities.[8] Recognizing the need for differing treatment of agriculture and industry,[9] Congress later included in the Clayton Act a section offering some protection for agricultural cooperatives from the prohibitions of the antitrust laws.[10] Congress' failure to delineate guidelines for determining legitimate cooperative objectives, however,

4. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., Civil No. 1-66-108 (D. Idaho, June 15, 1971) (Conclusions of Law No. 6-8). Judge McNichols found that defendant processing firms did not violate the Sherman Act and dismissed the main action. *Id.* (Conclusion of Law No. 3).

5. 15 U.S.C. § 17 (1970).

6. 7 U.S.C. § 291 (1970).

7. During Senate debates on the Sherman Act, Senator Sherman commented that agricultural organizations would be excluded from the prohibitions of the Act. The Committee of the Whole adopted Sherman's amendment effectuating this policy, but when the Bill was again referred to the Senate Judiciary Committee, the amendment was deleted. 21 CONG. REC. 2611, 2731 (1890).

8. *See, e.g.*, Burns v. Wray Farmers' Grain Co., 65 Colo. 425, 176 P. 487 (1918); Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N.E. 651 (1895); Reeves v. Decorah Farmers' Cooperative Soc'y, 160 Iowa 194, 140 N.W. 844 (1913).

9. Justice Frankfurter, in Tigner v. Texas, 310 U.S. 141 (1940), elaborated on this need, noting that "at the core of [the Clayton Act] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws." *Id.* at 146. *See also* Frost v. Corporation Comm'n, 278 U.S. 515 (1929) (Brandeis, J., dissenting), in which Justice Brandeis states: "It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification." *Id.* at 535.

10. Section 6 of the Clayton Act provides:

> 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 . . . agricultural . . . 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.

15 U.S.C. § 17 (1970). The House and Senate Committee Reports on the Bill manifested a congressional desire to erase all doubt about the propriety of the existence of agricultural associations meeting the statutory requirements for exemption, and also

left to speculation the scope of cooperative immunity. A need for clarification, in conjunction with the farmers' loss of European markets after World War I, mounting competition, and a new awareness of the importance of effective marketing organizations, prompted Congress in the Capper-Volstead Act[11] to expand and explain the agricultural exemption. The Act explicitly enumerated legitimate activities of qualifying cooperatives. Agricultural producers could collectively process, prepare for market, handle, and market their products. Furthermore, producer associations could employ common marketing agents and could enter into contracts and agreements to carry out their legitimate objectives.

The Supreme Court subsequently limited the extent of cooperative immunity in several particulars. *United States v. Borden Co.*[12] established that Capper-Volstead immunity does not protect a combination or conspiracy between an exempt cooperative and "other persons" who are not producers of agricultural goods. Similarly, the Court in *Case-Swayne Co. v. Sunkist Growers, Inc.*[13] denied immunity to a cooperative whose membership included nonproducers. In *Maryland & Virginia Milk Producers Association, Inc. v. United States*[14] the Court thoroughly examined the legislative histories of the Clayton and Capper-Volstead Acts. From its study, the Court inferred that the Acts sought to give individual farmers acting through cooperatives "the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities."[15] The Court found no evidence of a congressional desire to grant agricultural cooperatives an unlimited exemption from the antitrust laws or to condone co-

to prevent a judicial construction of the antitrust laws which would require dissolution of such cooperatives or interfere with the carrying out of their legitimate and lawful objectives. H.R. REP. No. 627, 63d Cong., 2d Sess. (1914); S. REP. No. 698, 63d Cong., 2d Sess. (1914).

11. 7 U.S.C. §§ 291-92 (1970). The Capper-Volstead Act expanded the Clayton exemption by extending antitrust immunity to cooperatives issuing capital stock. The Act, however, limited the scope of its applicability to associations operated for the mutual benefit of the members and meeting other formal criteria, including the requirement that the associations either permit each member only one vote or pay no more than 8% annual dividends on stock or membership capital. In addition, the Act prohibits associations from dealing in the products of non-members in an amount greater in value than products handled for members. *Id.* § 291.

12. 308 U.S. 188 (1939).

13. 389 U.S. 384 (1967). The legislative history of the Capper-Volstead Act indicates that Congress intended to confer immunity only upon producing farmers and those associations operated for the mutual help of their producer members. *Id.* at 391.

14. 362 U.S. 458 (1960).

15. *Id.* at 466.

operatives' predatory practices[16] violative of the Sherman Act.

The question whether statutory protection for collective actions would extend to agreements involving two or more cooperatives appeared expressly in the grant of certiorari in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*[17] The Supreme Court circumvented the issue, though, by holding that the three legal entities involved were in effect one organization and thus immune from antitrust liability. In the only other case to face the question, *United States v. Maryland Cooperative Milk Producers Association, Inc.*,[18] District Judge Holtzoff ruled that intercooperative agreements are immunized from antitrust liability. Two factors, however, limit the precedential value of the decision: first, because the case was a criminal action, the government could not appeal defendants' acquittal; and second, the Supreme Court in *Winckler* treated the issue without any reference to Judge Holtzoff's ruling or reasoning. Thus, the question whether agricultural cooperatives could combine to stabilize prices—a practice forbidden to competing business corporations—remained unanswered.

Finding no case law dispositive of the question, the *Treasure Valley* court relied primarily on the language of the Capper-Volstead Act in ruling that the bargaining activities complained of represented permissible marketing functions of the two cooperatives. The Act specifically permits several cooperatives to employ a common marketing agency.[19] Accordingly the court reasoned, cooperatives should also be able to consort without an agent and make the contracts necessary to perform their marketing activities. The court based this conclusion on the common law precept that if an agent's act would be lawful, then the same act by the principal is also lawful.[20] To further support its characterization of the bargaining activities as a legitimate part of the marketing function, the Ninth Circuit cited the Cooperative Marketing Act of 1926,[21] which expressly permits agricultural cooperatives and

16. For a summary of practices judicially determined to be predatory in nature, see Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 AD. L. REV. 455, 462-63 (1970).

17. 370 U.S. 19 (1962).

18. 145 F. Supp. 151 (D.D.C. 1956).

19. The Ninth Circuit cites dictum in Farmers' Livestock Comm'n Co. v. United States, 54 F.2d 375, 377 (E.D. Ill. 1931), in support of its reasoning. Eight cooperative associations had employed a common marketing agent. The court noted that the Capper-Volstead Act clearly authorizes common agency.

20. The fundamental agency maxim, *"Qui facit per alium, facit per se,"* (one acting by another is acting for himself) implies this principle. *Cf.* S.B. McMaster, Inc. v. Chevrolet Motor Co., 3 F.2d 469, 474 (E.D.S.C. 1925); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 14, at 26 (1964).

21. 7 U.S.C. § 455 (1970).

their common agents to exchange market and other economic information.

The court noted the conditional nature of the statutory exemption for agricultural cooperatives as it surveyed the limitations placed on the exemption by previous decisions. It maintained that none of these limitations applied precisely to the inter-cooperative agreement confronting it. The court of appeals pointed out that the district court found no evidence of predatory practices proscribed in *Maryland & Virginia Milk* and that such practices were not asserted on appeal. The court rejected the processing firms' contention that the cooperatives should be denied Capper-Volstead immunity because they did not perform any of the marketing activities specifically enumerated in the Act. Noting that Treasure Valley and Malheur bargained with potato processors for sales to be made by individual grower members, the court concluded that the necessary exchange of market information and the performance of other acts fell clearly within the scope of marketing functions contemplated by the Capper-Volstead Act.

The *Treasure Valley* decision represents the first definitive judicial approval of inter-cooperative agreements, yet the Ninth Circuit's reasoning and holding leave the perimeter of their immunity unexplored. Wisely devoting little attention to the ambiguous legislative histories of the Clayton and Capper-Volstead Acts,[22] the court correctly focused upon the Capper-Volstead Act in deciding the issue.[23] Argu-

22. The legislative histories are somewhat equivocal as to the extent of immunity conferred. Some legislators favored total exemption, while others propounded a limited one. Unfortunately, these divergent views emerge from the committee reports and the statements of the sponsors and floor managers of the legislation. Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35 (1960), presents an excellent analysis of the statutory scheme providing the agricultural cooperative exemption and of the legislators' divergent views.

23. Courts and commentators alike accept the idea that the Clayton Act provides the antitrust exemption for agricultural cooperatives and that the Capper-Volstead Act extends and clarifies this exemption. *See* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 391 (1967); Lemon, *The Capper-Volstead Act—Will It Ever Grow Up?*, 22 AD. L. REV. 443 (1970). An examination of the language of the two Acts supports this view. Although neither Act contains the "indisputably exempting language" of the type used by Congress in other statutes conferring antitrust immunity (*see, e.g.*, Small Business Act, 15 U.S.C. § 646 (1970)), the Clayton Act does expressly state that such agricultural organizations will not be construed as illegal under the antitrust laws. The Capper-Volstead Act, on the other hand, simply describes authorized activities. Because the district court record revealed that Treasure Valley and Malheur qualified individually for the Clayton exemption, the Ninth Circuit did not need to set out the exemption specifically; thus, it moved swiftly to a determination of whether the concerted bargaining efforts of the two cooperatives were within the scope of the activities authorized by the Capper-Volstead Act.

ments not mentioned in the Ninth Circuit's opinion, moreover, provide additional support for its conclusion. In 1961 Congress passed an omnibus farm bill.[24] The Senate version included two sections[25] reaffirming the national policy of aiding agricultural cooperatives and expressly permitting the combination of two or more cooperatives to perform those acts that individual cooperatives could lawfully perform.[26] The Conference Committee working on S. 1643 to produce a version acceptable to both houses omitted the two sections, noting that they constituted "a mere restatement of existing law."[27] In a pronouncement designed to aid future judicial constructions,[28] the House managers of the Bill construed existing statutory provisions to mean that cooperatives could act jointly in federations to perform those acts that farmers acting together in a single cooperative could perform.[29] The *Treasure Valley* court, in broadly construing cooperative immunity, thus implicitly tracked the construction Congress has given to immunity-granting legislation.

The Ninth Circuit's expansion of agricultural cooperatives' antitrust exemption finds justification in a number of policy considerations. Cooperatives must become strong enough through increased organizational and operational flexibility to play an effective role in the national economy.[30] To do so, cooperatives need sound legal bases for additional coordinated activities, ranging from informal cooperation among cooperatives in a particular market to legal merger or consolidation.[31] In addition, increased cooperative marketing, according to one commentator, would benefit the public by reducing the need for expensive

24. Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294 (codified in scattered sections of 7, 16 U.S.C.). The Senate version of this Act was S. 1643, 87th Cong., 1st Sess. (1961).

25. S. 1643, 87th Cong., 1st Sess. § 401(a)-(b) (1961). For the specific language of this section, see 107 CONG. REC. 13225 (1961).

26. 107 CONG. REC. 13261-62 (1961) (remarks of Senator Ellender). This section was proclaimed to be an authoritative expression of the intent of Congress on the power of cooperatives to unite and do business. 107 CONG. REC. 14519 (1961) (remarks of Senator Aiken).

27. 107 CONG. REC. 14565 (1961).

28. 107 CONG. REC. 14521 (1961) (remarks of Senator Holland, a Senate manager of the Bill, describing the House managers' statement).

29. 107 CONG. REC. 14565 (1961).

30. Knapp, *Are Cooperatives Good Business?*, 35 HARV. BUS. REV. 57, 61 (1957).

31. Mischler, *Agricultural Cooperative Law*, 30 ROCKY MT. L. REV. 381, 400 (1958). In *Tigner v. Texas* the Supreme Court noted that cooperatives "as a matter of economic facts [stood] in a different relation to the community from that occupied by industrial combinations." 310 U.S. at 145. Farmers' geographical dispersion, individualistic habits, and economic dependence on contingencies beyond their control necessarily result in a different economic significance attaching to farmers' cooperatives. *Id.*

federal aid to agriculture and by promoting greater efficiency in the marketing process, with savings passed on to the consumer.[32]

Despite its considerable basis both in statute and in reason, *Treasure Valley* should not be read as an untrammeled extension of immunity. Broadening the immunity to include inter-cooperative agreements presents several difficulties. First, an unchecked extension appears to contravene the Supreme Court's observation in *Maryland & Virginia Milk* that the general philosophy of the immunity provisions dictates that farmer cooperatives should have not only the same advantages, but also the same responsibilities as business corporations. Additional immunity would place agricultural cooperatives in a preferred position, giving them economic advantages not available to other business enterprises and allowing them to exceed Sherman Act boundaries for business activities. Second, cooperative combinations should be treated no more kindly than single cooperatives when they act in violation of Sherman Act proscriptions of predatory practices.[33] *Treasure Valley* clearly involved no such practices. The parties bargained in the sunshine with each knowing what the others were doing.[34] The court simply evaluated the agreement in the light of standards developed in prior decisions for a case-by-case examination of suspect practices.

Third, the *Treasure Valley* holding should extend only to inter-cooperative agreements with no anticompetitive economic significance in the relevant market. This anticompetitive significance standard[35] provides a clear test for determining the propriety of arrangements made to accomplish legitimate cooperative objectives in a *Treasure Valley*-type situation.[36] Neither Treasure Valley nor Malheur competed with or injured other potato sellers. Because all parties negotiated openly and because the processors maintained other sources for

32. Lemon, *supra* note 23, at 446.

33. The Attorney General specifically supported § 401(b) of S. 1643, which authorized joint performance of acts lawful for single cooperatives, maintaining that it would not restrain the prosecution of cooperatives engaging in forbidden predatory practices. 107 CONG. REC. 13358-59 (1961).

34. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., Civil No. 1-66-108 (D. Idaho, June 15, 1971) (Finding of Fact No. 16) (the status, prices, and terms of the contract negotiations were public knowledge in the agricultural communities involved).

35. Hufstedler, *supra* note 16, at 464.

36. *Cf.* United States v. Maryland Cooperative Milk Producers Ass'n, Inc., 145 F. Supp. 151, 154-55 (D.D.C. 1956). Because a common marketing agent would certainly seek the same prices for all his principals, the statutory approval of common agents permits the inference that Congress envisioned some degree of permissible price fixing among cooperatives. *Id.*

buying potatoes who were not parties to the tacit agreement, no anticompetitive economic effects harmed the processing firms. The test reveals still another implicit limitation on the Ninth Circuit's extension of immunity. In determinng the anticompetitive economic significance of an inter-cooperative agreement, a court must consider not only the effect of the agreement on parties immediately concerned but also its effect on third parties. Furthermore, because combinations of cooperatives threaten greater harm than cooperatives acting singly, courts should scrutinize inter-cooperative agreements with particular care. Although the *Treasure Valley* agreement injured no one, the court's extension of cooperative immunity ought not apply to an agreement producing adverse economic effects on other parties in the particular market.

Even apart from the effects of the cooperatives' activity, the very nature of that activity may run afoul of another major restriction on Capper-Volstead Act immunity—the requirement that the activity constitute a legitimate cooperative objective. The *Treasure Valley* court concluded that the cooperatives' bargaining activities were comprehended within the meaning of the statutory term "marketing." To reach this conclusion, the court of appeals ignored the district court finding that at no time during the relevant period did either bargaining association process, prepare for market, handle, market, buy, or sell any potatoes.[37] Similarly, the court rejected the processing firms' assertion that the cooperatives did not qualify for Capper-Volstead Act immunity because they engaged in none of the marketing activities enumerated in the Act. This claim, the court argued, begged the question, since the cooperatives did not have to sell potatoes to engage in marketing. The Ninth Circuit's contention, however, reveals a defect in its analysis. The court's definition of "marketing" ostensibly explains what the concept entails and provides a basis for its holding. Marketing, the court said, is the "aggregate of functions involved . . . in moving goods from producer to consumer, including *among others . . . supplying market information.*"[38] Although the authority of the source for this definition—the 1953 edition of *Webster's New Collegiate Dictionary*—may be questionable, the major flaw in the court's reasoning lies in its application of the definition to the facts. The cooperatives' bargaining activities, the judges decided, necessarily required "supplying market in-

37. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., Civil No. 1-66-108 (D. Idaho, June 15, 1971) (Findings of Fact No. 3, 4).

38. 497 F.2d at 215 (emphasis in original).

formation and *performing other acts* that are part of the aggregate of functions involved in the transferring of title to the potatoes."[39] Certainly, Treasure Valley and Malheur did supply their members with market information. The court, however, failed to specify what "other acts" of marketing the bargaining associations performed.

Future courts will find little reliable guidance in *Treasure Valley* on the crucial problem of defining the scope of permissible collusive activity. Although it immunized what would otherwise be a per se violation of the Sherman Act,[40] the Ninth Circuit granted Capper-Volstead Act immunity only after determining that no predatory practices were involved and that the agreement had no anticompetitive economic effect. Moreover, the harmless nature of the *Treasure Valley* bargaining agreement restricts the applicability of the immunity extension to other suspect practices. Bearing in mind the facts of the case, the decision is reasonable. The court's ruling logically extends the trend of judicial thought generated by Supreme Court statements on cooperative immunity. Inter-cooperative agreements devoid of destructive anticompetitive effects merit exemption from antitrust laws, even though similar agreements among other business enterprises fall to antitrust prohibitions. Yet the exemption for such agreements should in no way diminish the vitality of limitations applicable even to cooperatives acting alone.