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Justice Department and Private Plaintiffs Take Aim At Capper-Volstead Act's Protections for Agriculture

By CHRISTOPHER E. ONDECK & KATHLEEN CLAIR

Congress enacted the Capper-Volstead Act¹ in 1922 to empower farmers by permitting them to cooperate with each other under the protection of an immunity from the antitrust laws. The Act has been a success; in the last 87 years it has fostered a vibrant business model of farmers joining together into agricultural cooperatives for production and sales. Today there are approximately 3,000 farmer cooperatives in the United States, providing jobs for over 180,000 people and supplying much of the nation's food. But perhaps never in all the years since the Act's passage has it been subject to the level of government and private litigant

scrutiny that it faces today. The risk is that government enforcers and private litigants will roll-back key protections provided to cooperatives, in particular, the ability of cooperatives to avoid economically inefficient and wasteful production decisions, and the ability of members of cooperatives to streamline their farming operations by vertically integrating. In the short term, this could disrupt the functioning of the cooperative sector of U.S. agriculture, and in the long term, it could permanently reduce the competitiveness of U.S. farmers who operate using the cooperative model.

The Antitrust Division of the Department of Justice under the Obama Administration has turned a skeptical eye toward the Act and how it is used by modern cooperatives. The DOJ has launched and continued a series of investigations and enforcement actions involving agricultural cooperatives. Christine Varney, the new head of the DOJ Antitrust Division, has gone so far as to state that Congress might conclude that the Capper-Volstead Act "might not be the right law for the state of the industry as this time."² DOJ also has announced plans to embark on a series of high-profile joint workshops with the USDA to examine the state of competition in the agriculture sector, raising the specter of opening Pandora's box for immunities and possibly rolling them back

¹ 7 U.S.C. § 291-92.

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² Memorandum, Nat'l Council of Farmer Coops., Top Antitrust Official Says Coops May Have Outgrown Capper-Volstead Immunity, (Sept. 21, 2009) [hereinafter "NCFC Memo"] (on file with authors) (quoting *Crisis on the Farm: The State of Competition and Prospects for Sustainability in the Ne. Dairy Indus. Before the Comm. on the Judiciary*, 111th Cong. (2009) (statement of Assistant Attorney Gen. Christine Varney)).

in the agriculture sector.³ Clearly, agricultural cooperatives and the protection afforded them by the Capper-Volstead Act are high on the DOJ's current list of anti-trust enforcement priorities.

But the DOJ is not alone in focusing on new and more restrictive limits for the antitrust immunities available to agriculture. Alongside the DOJ is a group of plaintiff-side law firms that have filed a series of high-profile private litigant lawsuits against agricultural cooperatives.⁴ These lawsuits assert that the cooperatives in question have fallen outside the protection of the Capper-Volstead Act, either through the make-up of the membership or by their actions. The double-barreled scrutiny of the Capper-Volstead Act by the DOJ and private litigants is potent; and it has raised a substantial debate about certain key aspects of the Capper-Volstead Act. The primary questions are, first, what conduct may, and must, an agricultural cooperative engage in under the Act; and second, what entities may be members of such a cooperative?

New Scrutiny on Agriculture by the New Administration

The new Administration has articulated a set of priorities for its enforcement of the antitrust laws, and agriculture ranks high on the list. Christine Varney, in a statement to the Senate Judiciary Committee, made clear that “[c]ompetition issues affecting agriculture have been a priority for me since I was confirmed [this] spring as Assistant Attorney General for the Antitrust Division.”⁵ And cooperatives figure prominently in the DOJ's promise to focus on U.S. agriculture.⁶

The DOJ under the new Administration has kept that promise. The upcoming joint DOJ-USDA workshops will cover a broad range of topics concerning the state

of competition in agriculture,⁷ and Assistant Attorney General Varney has continued to re-affirm her focus on agriculture in even her most recent statements. In comments to the Senate Judiciary Committee in September, she stated that she is looking forward to working with Congress on the scope of the Capper-Volstead Act's immunity, and in an October speech before the National Association of Attorneys General she explained the DOJ's “thinking about agriculture markets” and solicited the state officials' involvement as well.⁸ And lastly, the DOJ has launched new investigations, and vigorously continued existing investigations, into the legal issues surrounding the uses of the Capper-Volstead Act by various agricultural cooperatives.

At stake is whether the Capper-Volstead Act will continue to protect the status quo of the traditional operations and conduct of agricultural cooperatives, or whether DOJ will seek to push back the current boundaries of the Act. The DOJ's primary focus appears to be on limiting the types of conduct in which a cooperative may engage under the Act; and particularly, on any conduct other than joint ownership of production assets and joint sales by the cooperative of its members' products.

The DOJ's current approach began to be formulated as far back as 2004, when the DOJ filed a civil antitrust complaint against the Eastern Mushroom Marketing Cooperative (“EMMC”), an agricultural cooperative that had engaged in a supply control program.⁹ The DOJ was concerned “that the EMMC had collectively removed 8 percent of the mushroom production capacity in the East region of the United States”¹⁰ and that this had resulted in higher prices. The DOJ investigated the EMMC and its members, and ultimately filed a suit alleging that “in order to support its price increases, the EMMC collectively purchased or entered lease options on mushroom farms and thereafter shut them down, adding deed restrictions that permanently removed significant production capacity from the market.”¹¹ To settle the DOJ case, EMMC and its members agreed to cease creating, filing or enforcing any further deed restrictions, and agreed to nullify the already-existing deed restrictions; in effect, the DOJ sought a cessation of the EMMC's supply-control program.¹²

The EMMC case is significant for what it says about the DOJ's attitude toward the Capper-Volstead Act for all conduct beyond merely joint ownership of assets and joint selling activity. Traditionally, the key benefit

³ Press Release, U.S. Dep't of Justice, Justice Dep't & USDA to Hold Public Workshops to Explore Competition Issues in the Agric. Indus. (Aug. 5, 2009) [hereinafter “Press Release, Public Workshops”], available at http://www.usdoj.gov/atr/public/press_releases/2009/248797.pdf.

⁴ See *Allen, et al. v. Sitts et al.*, 2:09-cv-00230 (D. Vt. filed Oct. 8, 2009) (against dairy cooperative and others); *In re Processed Egg Prods. Antitrust Litig.*, MDL No. 2002, 08-md-02002 (E.D. Pa. filed Dec. 2, 2008); *In re Se. Milk Antitrust Litig.*, MDL No. 1899, 2:08-md-1000 (E.D. Tenn. filed Jan. 10, 2008); *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683 (E.D. Pa. 2007).

⁵ *Crisis on the Farm: The State of Competition and Prospects for Sustainability in the Ne. Dairy Indus. Before the Comm. on the Judiciary*, 111th Cong. (2009) (statement of Assistant Attorney Gen. Christine Varney), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=4055&wit_id=8200.

⁶ See NCFCA Memo, *supra* note 2 (noting that Assistant Attorney General Varney “said that the Capper-Volstead Act was intended to bring small producers together, but that coops have grown beyond what was imagined when the statute was enacted.” “noted that . . . if coops act outside the scope of Capper-Volstead they will be subject to review and potential prosecution” and “said she is looking forward to working with Congress on the scope of the immunity”); Press Release, Public Workshops, *supra* note 3 (expressly soliciting commentary from agricultural cooperatives as well as other interested parties; noting that the workshops will “provide an opportunity for discussion for any concerns about the application of the antitrust laws to the agricultural industry”).

⁷ Notice of Public Hearing, 74 Fed. Reg. 165 (Aug. 27, 2009); Press Release, Public Workshops, *supra* note 3.

⁸ Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Nat'l Ass'n of Attorneys Gen.: Antitrust Federalism: Enhancing Federal/State Cooperation 6 (Oct. 7, 2009).

⁹ Complaint, *United States v. E. Mushroom Mktg Coop., Inc.* [hereinafter “U.S. v. EMMC”], No. 2:04-cv-5829, 2005 WL 3412413 (E.D. Pa. filed Dec. 16, 2004), available at <http://www.usdoj.gov/atr/cases/f206800/206856.pdf>.

¹⁰ Response of the United States to Public Comments on the Proposed Final Judgment, at 7, *U.S. v. EMMC*, No. 2:04-cv-5829 (E.D. Pa. issued June 30, 2004), available at <http://www.usdoj.gov/atr/cases/f209800/209844.pdf>.

¹¹ DOJ Competitive Impact Statement, at 1; *U.S. v. EMMC*, No. 2:04-CV-5829 (E.D. Pa. issued Dec. 16, 2004), available at <http://www.usdoj.gov/atr/cases/f206800/206857.pdf>.

¹² Final Judgment, at 1-3, *U.S. v. EMMC*, No. 2:04-cv-5829, 2005 WL 3412413 (E.D. Pa. entered Sept. 9, 2005).

provided by the Act was understood to be the ability for farmers to join together and thereafter act as if they were a single corporation or enterprise, without fear of prosecution as a conspiracy. And courts have consistently and clearly upheld that principle.¹³ In granting this benefit, the goal of the Act was unabashedly to empower farmers in the marketplace so they could receive greater returns.¹⁴ Congress granted this benefit in recognition of the absolute and immutable hardships that producers of agricultural products face in the marketplace – when they stand alone, they are at the mercy of the caprices of large buyers as well as natural catastrophe. Either nature or a powerful buyer could wipe out the efforts of a sole farmer, leading to poor economic and societal results for our economy and country. So the protection provided by Congress has been understood by the agriculture sector and by courts to permit farmers to act together, as corporations do, in their decisions, including among other things: supply and production, ownership of assets, dealings with input costs and vendors, processing, and sales. Now, however, indications are that DOJ is revisiting the past 87 years of precedent and usage of the Act by cooperatives, and the case law that has validated it, to scrutinize whether the Act covers decisions regarding supply and production (a/k/a “supply control” as in the EMMC case), and more broadly, whether the Act protects any conduct beyond joint ownership of assets and joint sales.

The DOJ’s current investigations into agricultural cooperatives greatly elevate this concern. From public reports and other sources regarding those investigations, the indications are that DOJ is internally considering its position as to whether the Capper-Volstead Act covers “supply control” activity by an agricultural cooperative. A confluence of events including the current recession, along with other challenges to agriculture in the United States, have elevated the issue of whether a cooperative has the right to engage in advance planning and agreement among its member-owners for the amount of product that they will produce, in the way that a corporation does. Recently, there have been several high-profile instances of cooperatives determining that they needed to request that their members reduce their over-production, or otherwise make joint decisions about the amount they would collectively produce.

There are strong arguments that decided case law and accepted industry practice establish that the Capper-Volstead Act protects supply-control decisions and agreements of a cooperative working in conjunction with its members. The courts that have considered the question have upheld the legality of cooperatives’ efforts to control or stabilize supply, as part and parcel of a cooperative’s ability to maximize returns for its members.¹⁵ But DOJ appears to be re-examining that issue.

¹³ *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 466-67 (1960); *Mktg. Assistance Plan v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1023 (S.D. Tex. 1972).

¹⁴ *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 825-26 (1978).

¹⁵ *E.g., Ewald Bros., Inc. v. Mid-America Dairymen, Inc.*, 877 F.2d 1384, 1388-94 (8th Cir. 1989); *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1187-88 (8th Cir. 1982); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 615-16, 632-33 (M.D. Ga. 1981), *aff’d* 715 F.2d 520 (11th Cir. 1983).

In addition, there are indications that DOJ also is examining whether the Capper-Volstead Act *requires* cooperatives to engage in certain activity, in order to receive the protections of the Act. The question underlying this concern is whether cooperatives must themselves handle the sales and marketing of their member’s products, as opposed to merely serving as a venue for other activities permitted by the Act. Under this theory, those other activities would not be permitted if the cooperative did not first fulfill the condition precedent of engaging in joint sales and marketing. Of course, a substantial body of on-point case law has addressed this issue, and has ruled decisively that a cooperative is *not* required to engage in any specific set of activities in order to receive the protection of the Act.¹⁶ For these reasons, the current DOJ antitrust enforcement focus on agriculture, posing questions as to what actions a cooperative can, and must, engage in, is a new important tide that threatens to limit the coverage of the Capper-Volstead Act.

A Wave of Civil Class Actions Is Challenging Capper-Volstead Protection

In addition to government investigations, agricultural cooperatives appear to have caught the attention and interest of plaintiff-side class action law firms. Indeed, the number of antitrust actions in the agriculture industry doubled year-over-year from 2007 to 2008, with many of the filings involving cooperatives and the Capper-Volstead Act, and 2009 is shaping up to be another active year.¹⁷ The law firms bringing these class actions have sown a crop of high-profile and high-dollar amount antitrust lawsuits against agricultural cooperatives. These include cooperatives involved in ubiquitous food commodities such as mushrooms, eggs, dairy and others. In several instances, the lawsuits hinge on piercing through the immunity provided by the Capper-Volstead Act. The private lawsuits rely in part on the same theory as the DOJ does (regarding the Act’s coverage of supply control), but they have also added new threats to Capper-Volstead – including a re-examination of what types of entities are permitted to be members of a cooperative, and the business activities in which the entities can engage.

These lawsuits are challenging long-held ideas about who can be a member of a cooperative under the Act. A well-established body of case law, including the Supreme Court decisions in *Case-Swayne*¹⁸ and in *Na-*

¹⁶ *E.g., N. Cal. Supermarkets v. Cent. Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 992 (N.D. Cal. 1976) (“[E]ven if [the cooperative] engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.”), *aff’d per curiam*, 580 F.2d 369 (1978) (affirming “for the reasons stated by the trial judge”), *cert. denied*, 439 U.S. 1090 (1979).

¹⁷ See Westlaw, Industry Report: AG Cases (customized report documenting docket filings and case opinions from January 2007 through October 2009) (on file with authors).

¹⁸ *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1968).

tional Broiler,¹⁹ has established that corporate entities may be members of a cooperatives, as long as they are engaged in bona fide production of the relevant agricultural product, and members are permitted to engage in other production and processing activities as vertically integrated businesses.

The question of “who is permitted to be a member of a cooperative under the Act?” certainly is at issue in the ongoing civil litigation involving the mushroom growers cooperative, *In re Mushroom Direct Purchaser Antitrust Litigation*.²⁰ The court there rejected Capper-Volstead immunity, because in one or two instances, families that owned mushroom farming operations as well as related distribution operations had registered the distribution business as the member of the cooperative instead of the related farming operation. The court held that this action, alone, stripped the protection of the Act from the entire cooperative.²¹

Significantly, the court’s ruling does not acknowledge the concepts of common ownership or control under which many farming businesses function. Family-ownership groups and other group of owners often separately incorporate both a farming operation and a related processing operation, though in actuality they are a common enterprise. In many instances, the related processing operation handles all the day-to-day sales functions and possesses all the relevant data, and therefore is the much more logical participant to interact on behalf of the overall farming enterprise with a cooperative — where it acts on behalf of its related farming operations. Cooperatives up to now have operated on the theory that the *Copperweld* doctrine²² would protect this type of membership by related entities, or that the theory of agency (a concept specifically referenced in the Act itself) enabled participation by a combined farming/processing ‘family’ of businesses. But now that is all cast into doubt by the court’s ruling in the mushroom class action. That ruling’s unintended consequence also may be to engender a rash of follow-on litigation against cooperatives, particularly in instances where members have diverse ownership structures and possess related processing and distribution operations.

¹⁹ *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816 (1978).

²⁰ *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683 (E.D. Pa. 2007) (alleging Sherman Act §§ 1 and 2 and Clayton Act § 7 violations).

²¹ 621 F. Supp. 2d 274, 283-86 (E.D. Pa. 2009).

²² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 742 (1984).

Emboldened by the court’s ruling in the mushroom case, plaintiff-side law firms have continued and intensified their assault on cooperatives that rely on the Capper-Volstead Act. Most recently, new class actions have been filed against a cooperative of egg producers, contesting aspects of their Capper-Volstead Act status in a cooperative,²³ and against dairy cooperatives, where Capper-Volstead Act defenses may play an important role.²⁴

Predictions: More Probing Attacks on Capper-Volstead

The current scrutiny by the DOJ and by plaintiff-side law firms is challenging many long-held notions about the Capper-Volstead Act. Since 1922, courts generally have adopted an expansive view of the protections offered by the Capper-Volstead Act, reasoning that Congress intended to provide farmers with the ability to act as if they were a single corporation, and thereby to gain greater bargaining power. Yet now DOJ is focused on agriculture generally, and on cooperatives and their immunities specifically, and may be revisiting the impact of prior jurisprudence involving the Act.

It is very probable that DOJ will continue its inquiry into whether the coverage that cooperatives have long assumed Capper-Volstead provided can be pushed back in certain areas. As noted, the primary issues are (1) can a cooperative and its members engage in activities beyond mere joint ownership of assets, and joint sales, and (2) must a cooperative engage in joint sales in order to retain the protection of the Act for its other activities? All signs point to further inquiries on these issues by the DOJ. Unfortunately, these expeditions into Capper-Volstead law by DOJ provide both a roadmap and fuel for private class action lawsuits, and more such cases are likely to follow. Their focus has been on the integration of farming and processing operations that is prevalent in most farming operations in the United States, and it will be up to the courts to resolve the debate as to whether Capper-Volstead will continue its coverage of such integrated businesses, as it has for the past 87 years.

²³ Consol. Am. Class Action Compl., *In re Processed Egg Prods. Antitrust Litig.*, MDL No. 2002, 08-md-02002 (E.D. Pa. filed Jan. 30, 2009); Consol. Am. Class Action Compl. by Indirect Purchaser Plaintiffs, *In re Processed Egg Prods. Antitrust Litig.*, MDL No. 2002, 08-md-02002 (E.D. Pa. filed Feb. 27, 2009).

²⁴ *Allen, et al. v. Sitts et al.*, 2:09-cv-00230 (D. Vt. filed Oct. 8, 2009).