Arkansas Law Review

Volume 74 | Number 1 Article 1

April 2021

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FARMER COOPERATIVES "TAKE COVER": THE CAPPER-VOLSTEAD EXEMPTION IS UNDER SIEGE

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"When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization."[1]

I. INTRODUCTION

There can be little dispute that food production is of vital interest to any nation's security and economy. For this reason, the United States Congress, like many other legislatures around the world, has accorded special treatment to the agricultural industry, and particularly to farmers. One example of this special treatment is the Capper-Volstead Act, which provides farmers with immunity from antitrust liability for joint conduct undertaken by and through an "association" of producers.[2]

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1. DANIEL WEBSTER, REMARKS ON AGRICULTURE, Jan. 13, 1840.

2. 7 U.S.C. § 291. Introduced by Senator Arthur Capper (R) Kansas and Representative Andrew Volstead (R) Minnesota. William Richard Tillman, The Legislative History of the Capper-Volstead Act 42 (1930) (unpublished M.A. thesis, University of Kansas) (on file with the University of Kansas). An "agricultural cooperative" is simply an association of agricultural producers—"farmers"—and thus the term is used interchangeably

As the country transformed itself from an agrarian economy to a more industrialized and urban economy, an imbalance in bargaining power grew between farmers, on the one hand, and their customers—processors or distributors (e.g., large supermarkets)—on the other.[3] Farmers were at risk of going bankrupt or being forced to sell their land.[4] This untenable situation imperiled the nation's food supply and risked raising consumer prices for food staples to unacceptable levels.[5] Enacted in 1922, the Capper-Volstead Act was intended to correct this power imbalance by allowing farmers to associate with each other and collectively market their products.[6] Indeed, because some of the more essential functions of agricultural cooperatives implicate the antitrust laws, the Capper-Volstead Act has been key to allowing farmers to achieve their objectives, and has even been referred to as the "Magna Carta" of agricultural cooperatives.[7]

Notwithstanding the historical centrality of the Capper-Volstead Act to the efficient functioning of agricultural cooperatives, the protections afforded by the Act have been under increasing attack in private antitrust litigation. In recent years, class actions have been filed against mushroom, potato, egg, and dairy farmers, and their cooperatives.[8] In addition, many middlemen, including large supermarkets and other power buyers, have opted out of these classes and chosen to bring their own actions. These "opt out" plaintiffs include some of the

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with "farmer cooperative." *Agricultural Cooperative*, CAMBRIDGE DICTIONARY, [https://perma.cc/HD49-4UEZ] (last visited Jan. 20, 2021).

3. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 825-26 (1978); *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 830 (Brennan, J., concurring).

4. *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 830 (Brennan, J., concurring).

5. *See* DONALD A. FREDERICK, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 63, 66 (2002).

6. *See Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 824-26.

7. EWELL PAUL ROY, COOPERATIVES: TODAY AND TOMORROW 215-216 (2d ed. 1969).

8. *See generally In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274 (E.D. Pa. 2009); *In re* Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867 (E.D. Pa. 2012); *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141 (D. Idaho 2011) (recently settled); Edwards v. Nat'l Milk Producers Fed'n, No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014) (recently settled). In the interest of full disclosure, Mr. Barnes is counsel of record in *In re* Mushroom Direct Purchaser Antitrust Litig, and both Mr. Barnes and Mr. Levine are lead counsel for one of the largest defendants in *In re* Processed Egg Prods. Antitrust Litig.

largest supermarket chains in the world—the very type of "power buyer" middlemen whose disproportionate bargaining leverage motivated Congress to enhance and protect the collective bargaining power of farmers by passage of the Capper-Volstead Act.[9] Each of these antitrust cases involve conduct that, arguably, is immune under the Capper-Volstead Act.[10] Yet, the plaintiffs in these actions challenge the application of the Capper-Volstead Act and raise issues that go to the heart of the antitrust exemption, potentially exposing thousands of agricultural cooperatives and their members to crippling damages awards.

While the Capper-Volstead Act is often referred to as arcane,[11] the number of antitrust suits filed in the past ten to fifteen years against farmers and their cooperatives have engendered more scrutiny of this legislation than at any other time in the past. This Article endeavors to explain the current issues facing the Capper-Volstead Act and the potential consequences of judicial decisions that rob it of its effectiveness. We begin with a description of the key cooperative antitrust exemption statutes and their origins, and then proceed to address the pending legal challenges and the threats they pose to the exemption and to cooperatives and farmers themselves.[12] We also consider whether these decisions may have consequences beyond the United States' borders.[13]

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9. Bridget Goldschmidt, *Grocers' Claims Rejected in Egg Antitrust Case* (Dec. 13, 2019), [https://perma.cc/R5CS-RML7]; A.S. Klein, Annotation, *Monopolies: construction of § 1 of the Capper-Volstead Act (7 U.S.C.A § 291) authorizing persons engaged in the production of agricultural products to act together in associations*, 20 A.L.R. Fed. 924 (1974).

10. See *In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d at 278-79; *In re* Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d at 877; *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d at 1148-49; *Edwards*, 2014 WL 4643639, at *1.

11. Transcript of Oral Argument at 268, *In re* Processed Eggs Prod. Antitrust Litig., No. 08-md-2002 (E.D. Pa. 2016).

12. *See infra* Parts II-IV.

13. *See infra* Part V.

II. THE DEVELOPMENT OF THE CAPPER-VOLSTEAD ACT

A. The Years Leading Up to 1922

One hundred years after Samuel Slater opened the first industrial mill in the United States, which was widely credited as the beginning of the American industrial revolution, Congress passed the Sherman Act in 1890.[14] At the time, there was intense public opposition to the concentration of economic power in large corporations.[15] Farmers in particular complained because of the high prices they were charged for transporting their products to the cities by railroad.[16] Large industrial trusts were seen as stifling competition and causing prices to increase even higher.[17] Thus, Section 1 of the Sherman Act makes it unlawful to engage in concerted conduct "in restraint of trade."[18]

Partly as a response to the industrial revolution, which caused many farmers to leave their land in search of work in the cities, the concept of agricultural cooperatives took hold in Europe in the late 1700s.[19] Cooperatives allowed small, independent farmers to pool their resources and become more efficient.[20] By the 1800s, the concept of a cooperative took hold in the United States and became prominent in the agricultural sector.[21] The American Farm Bureau and the National Farmers Union emerged as strong promoters of agricultural cooperatives in the early 1900s by providing technical assistance to new cooperatives, and by lobbying for the enactment of state and

14. Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 580 n.109, 612 (1994).

15. FREDERICK, *supra* note 5, at 22.

16. *Id.* at 9.

17. 21 CONG. REC. 2461 (Mar. 21, 1890) (statement of Sen. Sherman).

18. 15 U.S.C. § 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 declared to be illegal.").

19. *See History of Co-ops*, CO+OP, WELCOME TO THE TABLE, [https://perma.cc/ZE2L-CDS5](last visited Jan. 22, 2021).

20. *See id.*

21. FREDRICK., *supra* note 5, at 9-10, 19-21.

federal legislation favorable to cooperatives.[22] And as cooperatives continued to grow, they were being sued for violations of the Sherman Act, the very statute that many of them hoped would bring them relief from the railroad trusts.[23] For example, dairy farmer associations grew quickly in the early 1900s as they assisted their members by setting a minimum price for their members' products. But, they faced several antitrust actions, which discouraged future membership.[24]

The reach of the Sherman Act was quite broad and prohibited conduct that Congress did not wish to condemn. Thus, in 1914, Congress enacted the Clayton Act.[25] Of relevance here, Section 6 of the Clayton Act provides:

> 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.*[26]

Section 6 of the Clayton Act recognized the unique problems facing farmers and cooperatives, along with their counterparts in the workforce, namely workers and their labor unions.[27] Each group faced an enormous imbalance in bargaining power when facing grocery retailers and employers, respectively, but each were prohibited by the Sherman Act from joining together to gain any leverage. Section 6 sought to correct that situation by treating all members of the association as being part of a single organization and therefore incapable of conspiring under Section

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22. *See History*, American Farm Bureau Federation, [https://perma.cc/W393-TBP2](last visited Jan. 22, 2021); *History*, National Farmers Union, [https://perma.cc/3DY3-DS8G](last visited Jan. 22, 2021).

23. *See* FREDERICK, *supra* note 5, at 62, 69-70, 74.

24. *Id.* at 61-62.

25. Clayton Act, 15 U.S.C. §§ 12-27.

26. 15 U.S.C. § 17 (emphasis added).

27. 15 U.S.C. § 17.

1 of the Sherman Act, thus becoming the original legislative foundation for the agricultural cooperative antitrust exemption.[28]

But the language of Section 6 posed another problem. By its terms, it only applied to cooperatives that did not issue capital stock.[29] Indeed, raisin grape growers, under threat of prosecution from the Department of Justice, entered into a consent decree just a month before the Capper-Volstead Act was passed.[30] Previously, the Federal Trade Commission had reported that Section 6 of the Clayton Act did not apply to the current structure of the raisin growers' association because it had capital stock.[31]

B. The Passage of the Capper-Volstead Act

The fact that the antitrust protections contained in Section 6 were limited to non-stock cooperatives proved to be a real problem. Congress believed that extending protection to cooperatives that issued stock would increase farmers' incentive to unite and enhance their economic strength.[32] An extension of the protection was necessary because farmers were continuing to be at a severe disadvantage in the marketplace. Not only were they subject to the whims of Mother Nature, but they were also at the mercy of processors and distributors who could dictate terms of sale.[33] This was especially disadvantageous for the farmers dealing in perishable commodities.[34]

Thus, the Capper-Volstead Act was enacted in 1922 to clarify and expand the exemption in Section 6 of the Clayton Act and to include cooperatives with capital stock:

> 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, in collectively processing, preparing for market, handling, and marketing in

28. Note, *Trust Busting down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 352-56 (1975).

29. 15 U.S.C. § 17.

30. FREDERICK, *supra* note 5 at 62-63, 66.

31. *See id.* at 65-66.

32. *Id.* at 94-100, 102-03.

33. *See id.* at 91.

34. 62 CONG. REC. 2123 (1922) (statement of Sen. Walsh).

> 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 . . . .[35]

The expanded exemption spelled out certain structural requirements that a farmer cooperative had to meet before it was entitled to antitrust immunity. Specifically, it required that the association must be "operated for the mutual benefit of the members . . . as . . . producers . . . ."[36] Second, each member may have only one vote, *or* the cooperative must limit dividends on capital stock to eight percent per annum.[37] Third, the cooperative cannot deal in non-member products in an amount greater in value than the products of members.[38]

The Act expressly exempted the "collective[] processing, preparing for market, handling, and marketing" of agricultural products.[39] Judicial decisions have interpreted the Capper-Volstead Act to include the ability to fix prices,[40] form federations of cooperatives,[41] vertically integrate,[42] achieve monopolies,[43] and include foreign members in domestic cooperatives.[44]

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35. 7 U.S.C. § 291. Interestingly, the Act references *associations* not *cooperatives*. Indeed, no formal corporate structure is mandated by the Act. Nevertheless, the two have become synonymous because agricultural associations that wish to avail themselves of Capper-Volstead Act protections have typically organized themselves into cooperatives.

36. 7 U.S.C. § 291. Throughout this article, the term "farmer," "producer," and "grower," are used interchangeably and are intended to identify those persons or entities that qualify for the protections of the Capper-Volstead Act.

37. 7 U.S.C. § 291.

38. 7 U.S.C. § 291.

39. 7 U.S.C. § 291.

40. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 214 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

41. United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981).

42. N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 985-86 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 27-29 (1962).

43. Cape Cod Food Prods., Inc. v. Nat'l Cranberry Ass'n, 119 F. Supp. 900, 907 (D. Mass. 1954); GVF Cannery, Inc. v. Cal. Tomato Growers Ass'n, 511 F. Supp. 711, 716 (N.D. Cal. 1981).

44. Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., 382 F. Supp. 2d 221, 224-26 (D. Mass. 2004); *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1157-58 (D. Idaho 2011).

But courts have held that the Act does not immunize all cooperative behavior. The immunity does not apply to situations where the cooperative: (a) conspires with a non-cooperative or non-producer entity;[45] (b) enrolls non-farmers as members;[46] (c) engages in predatory conduct;[47] or (d) monopolizes to such an extent that prices are unduly enhanced.[48] Additionally, Section 2 of the Capper-Volstead Act authorizes the Secretary of Agriculture to obtain a cease and desist order if he finds that an association has monopolized or restrained trade to such an extent that the price of any agricultural product is unduly enhanced.[49]

III. THE EXEMPTION UNDER ATTACK

One of the principal challenges in advising farmers and their cooperatives, and in litigating the applicability of the Capper-Volstead exemption, is the paucity of case law interpreting the statute. Since its enactment in 1922, there have been less than 250 cases that involve the Capper-Volstead Act, while there have been tens of thousands of cases dealing with the Sherman Act, a statute that is only thirty-two years older.[50]

This dearth of case law has provided plaintiffs with plenty of opportunities to chip away at the exemption.[51] This is especially true given the evolution and complexity of modern agricultural cooperatives.

Some of the more recent challenges to the Capper-Volstead Act include the following:

The inadvertent inclusion of a non-farmer in the cooperative. Under certain circumstances, a cooperative can lose its antitrust

45. United States v. Borden Co., 308 U.S. 188, 204-05 (1939).

46. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 822-24, 826-29 (1978).

47. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 463, 465-67 (1960).

48. *Id*. at 462; *see also* 7 U.S.C. § 292.

49. *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 462; 7 U.S.C. § 292.

50. At the time of publication, there were only 222 cases dealing with the Capper-Volstead Act (7 U.S.C. § 291) and 19,321 dealing with the Sherman Act (15 U.S.C. § 1).

51. The Antitrust Division of the Department of Justice has also publicly stated that the Capper-Volstead Act should be narrowly construed and applied in only limited circumstances. *See, e.g.*, Statement of Int. on Behalf of the U.S. at 13, Sitts v. Dairy Farmers of Am., Inc., Case No. 2:16-cv-00287-cr (D. Vt. July 27, 2020).

immunity if its membership includes non-farmers.[52] But many farming operations are family-owned and utilize different corporate entities for various aspects of the business, such as one entity devoted to the farming operation while another is devoted to processing the product. What happens if the owners of the various agricultural businesses inadvertently had one of their non-farming entities (e.g., a distribution company) sign the cooperative membership application, even though it is clear that their farming entities were really the intended members? Will that destroy the immunity?[53]

If the cooperative does not qualify for Capper-Volstead protection because it inadvertently (or negligently) includes a non-producer among its membership, or loses the exemption because of an after-the-fact determination by the judiciary on an issue of first impression, are the farmer-members subject to antitrust liability, even though they relied in good faith on the cooperative's representation that it qualified for Capper-Volstead immunity?[54]

Given the broad statutory language protecting cooperatives' ability to collectively handle, prepare for market, and market members' commodities, are cooperative efforts to manage supply (both pre-planting and post-harvest) protected by Capper-Volstead? In other words, while it is clear that farmer-members can fix prices for their products sold through the cooperative, can the cooperative and its members collectively decide on pre-production (pre-planting for crops or culling practices for livestock) strategies to manage and reduce supply?[55] What about collectively managing post-production supply?[56]

While cooperative members must be farmers, does the Act's protection extend to cooperatives and cooperative members with value added (vertically integrated) operations?[57] In other words, if a tomato farmer is part of a tomato grower's cooperative but the farmer also has a processing plant that produces tomato juice from

52. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 828-29 (1978).
53. *See infra* Part III.A.
54. *See infra* Part III.B.
55. *See infra* Part III.C.
56. *See infra* Part III.C.
57. *See infra* Part III.D.

its harvested tomatoes, does the fact that the farmer also has these processing capabilities destroy its status as a "farmer," thus robbing the cooperative, and all the other members, of the Act's protections?[58] The same question applies to vertically integrated cooperatives as well.

Finally, when does an entity qualify as a farmer?[59] Understandably, if a company simply distributes or processes agricultural products and engages in none of the traditional farming operations, the entity would not have a valid claim to farmer status. But, what if it owned the land and simply leased it out to another entity that raised the crops or livestock?[60] Conversely, is a sharecropper a farmer?[61] What if the entity did not have title to the livestock or the land, but engaged in all of the husbandry practices?[62]

A. Inadvertent Inclusion of a Non-Farmer: Will an Honest Mistake Destroy the Exemption?

The district court in *In re Mushroom Direct Purchaser Antitrust Litigation* said yes.[63] In that case, plaintiffs alleged that a cooperative and its members conspired to fix and raise the price of mushrooms while also engaging in activities that reduced the number of mushrooms produced nationally.[64] One of the "members" of the mushroom cooperative was a produce distributor, which was owned by several family members.[65] These same family members also owned a mushroom farm and another related company.[66] The two non-farm companies neither farmed the land nor grew the mushrooms.[67] The family intended to enroll the mushroom growing company as the member, but by mistake, the cooperative membership agreement was signed by

58. *See infra* Part III.D.
59. *See infra* Part III.E.
60. *See infra* Part III.E.
61. *See infra* Part III.E.
62. *See infra* Part III.E.
63. *In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 278-79, 286 (E.D. Pa. 2009).
64. *Id.* at 279.
65. *Id.* at 278.
66. *Id.*
67. *Id.* at 278-79.

one of the non-grower companies.[68] In a 2009 decision, the district court denied the cooperative's motion for summary judgment, and granted the plaintiffs' cross motion for summary judgment, on the issue of Capper-Volstead immunity.[69] The court rejected defendants' argument that the mistaken designation of the non-farmer member was a "*de minimis* exception" and held that "the existence of even one non-farmer member in an agricultural cooperative is sufficient to destroy Capper-Volstead immunity."[70] On appeal, the Third Circuit declined to reach the merits.[71]

The courts in *In re Mushroom Direct Purchaser Antitrust Litigation* and *In re Processed Egg Products Antitrust Litigation*, accepted that a non-farmer's membership in a cooperative will destroy the Capper-Volstead exemption.[72] That viewpoint is based on a strict reading of the Supreme Court's decision in *National Broiler Marketing Association v. United States*, where the Court denied immunity to a cooperative in which a very small number of its approximately seventy-five members were not traditional farmers or producers.[73] The court stated: "a cooperative organization that includes [non-farmers]—or even one of them—as members is not entitled to the limited protection of the Capper-Volstead Act."[74]

But subsequent courts did not take such a black and white approach to the issue and limited *National Broiler Marketing Association* to its particular facts. In fact, just four years after *National Broiler Marketing Association* was decided, the Eighth Circuit employed a more nuanced approach.[75] In *Alexander v. National Farmers Organization*, the cooperative had several non-producers who paid membership dues that were functionally equivalent to donations.[76] Moreover, these non-producers were

68. *In re Mushroom Direct Purchaser Antitrust Litig.*, 621 F. Supp. 2d at 284.
69. *Id.* at 291.
70. *Id.* at 285.
71. *In re Mushroom Direct Purchaser Antitrust Litig.*, 655 F.3d at 164 n.4.
72. *Id.* at 286; *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2016 WL 5539592, at *13 (E.D. Pa. Sept. 28, 2016).
73. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 820, 822, 827-29 (1978).
74. *Id.* at 828-29.
75. Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1187 (8th Cir. 1982).
76. *Id.* at 1185-86.

not on the Board and had no voice in the management of the cooperative.[77] Under these circumstances, the court did not allow the non-farmer membership to destroy the exemption.[78] The court reasoned that, prior to *National Broiler Marketing Association*, "it was not at all clear that careless membership practices would, standing alone, preclude operation of the exemption."[79] The court further characterized the non-farmer members in *National Broiler Marketing Association* as "essentially middlemen" and distinguished the non-farmers in the present case as supporters, reasoning that the "receipt of twenty-five dollars in 'dues' from a handful of individuals is hardly the same as shielding middlemen from price-fixing liability."[80] Thus, the court ultimately held that the Capper-Volstead exemption immunized the cooperative's activities, even though individuals unrelated to the industry had paid membership dues during the period.[81]

Many years later, a district court considered whether the inclusion of non-producer "associate members"—who had no control over the cooperative's operations—would affect eligibility for Capper-Volstead immunity.[82] The court determined that immunity could still apply.[83] As the court held, "[s]imply put, associate members with no control over an agricultural cooperative are not true statutory 'members' and do not strip the cooperative of its exempt status."[84]

Thus, it is unclear whether the mere membership of a non-farmer, especially one who has no meaningful involvement in the management of a cooperative, will destroy the antitrust immunity a cooperative would otherwise enjoy. And though the court in *In re Mushroom Direct Purchasers Antitrust Litigation* held that the inadvertent designation of the wrong company as a cooperative member destroyed the exemption, the reasoning and tenor of the

77. *Id.* at 1186.
78. *See id.* at 1187.
79. *Id.* at 1186.
80. *Nat'l Farmers Org.*, 687 F.2d at 1186.
81. *Id.* at 1187.
82. Agritronics Corp. v. Nat'l Dairy Herd Ass'n, 914 F. Supp. 814, 823-824 (N.D.N.Y. 1996).
83. *Id.*
84. *Id.* at 824.

two other post-*National Broilers Marketing Association* decision cited above casts doubt that other courts would reach the same conclusion.[85] Indeed, in declining to rule on the interlocutory appeal, the Third Circuit noted "[t]here is no dispute that the question, whether the arguably inadvertent inclusion of an ineligible member strips an agricultural cooperative of Capper-Volstead protection, is both serious and unsettled."[86] To date, this is the only appellate court decision to have even mentioned this specific issue.

B. Will a "Good Faith" Belief in the Exempt Status of a Cooperative be Enough?

Certain grower-defendants in *In re Mushroom Direct Purchaser Antitrust Litigation* later moved the district court to reconsider its 2009 decision, arguing they should not lose their Capper-Volstead immunity simply because the cooperative or a fellow member made a mistake, given that they acted under a "good faith" belief (based on the advice of their counsel) that their cooperative was properly constituted.[87] The district court rejected that argument, reasoning that because proof of "specific intent" is not required in order to establish a violation of Section 1 of the Sherman Act, good-faith reliance on the advice of counsel affirming Capper-Volstead status of the cooperative could not serve to defeat plaintiffs' Section 1 claims.[88]

The district court in *In re Mushroom Direct Purchaser Antitrust Litigation* also considered the defendants' argument that the three family-owned companies, including the non-grower, might be considered a "single entity" incapable of conspiring under the Sherman Act.[89] But the court rejected that argument as well, holding that "the single entity defense cannot be used to circumvent the Capper-Volstead Act's requirement" that a

85. *See In re* Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 162-63, 167 (3d Cir. 2011); *see also Nat'l Farmers Org.*, 687 F.2d at 1187; *Agritronics Corp.*, 914 F. Supp. at 823-24.

86. *In re Mushroom Direct Purchaser Antitrust Litig.*, 655 F.3d at 164 n.4.

87. *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 391 (E.D. Pa. 2014).

88. *Id.* at 391-93.

89. *See id.* at 386, 388.

cooperative can only include producer members to qualify for immunity.[90] Although the district court certified its rulings on both the good faith and single entity issues for interlocutory appeal, the Third Circuit declined to hear the appeal,[91] leaving the district court's rulings to stand.

The good-faith issue surfaced again in *In re Processed Eggs Products Antitrust Litigation*.[92] In moving for summary judgment, one of the producer-defendants argued that a cooperative member's good-faith belief that the cooperative qualified for Capper-Volstead immunity should be sufficient to protect the innocent member.[93] The defendant argued that denying it the protections of the Act, despite the producer's good-faith belief that the cooperative qualified, would frustrate the entire intent of the Act and would subject producers to enormous liability because of the cooperative's failure to police its membership rolls.[94]

Moreover, the exemptions for both agriculture and labor stem from Section 6 of the Clayton Act and are akin to fraternal twins.[95] Because union members enjoy protection from the antitrust laws based on a good-faith belief that the labor exemption from the antitrust laws applied to their union,[96] the defendant argued that agricultural producers should be afforded the same right.[97] It further argued that the focus of the good-faith inquiry should be on whether the farmer-member had a good faith

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90. *Id.* at 390-91.

91. *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 14-8135 (3d Cir. Dec. 2, 2014).

92. *See* Memorandum of Law in Support of Rose Acre Farms, Inc.'s Motion for Summary Judgment at 23-24, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002 (E.D. Pa. July 2, 2015), ECF No. 1238 [hereinafter Memorandum in Support of Rose Acre].

93. *Id.* at 23-25. *See also* Reply Memorandum of Law in Support of Rose Acre Farms, Inc.'s Motion for Summary Judgment at 49-50, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002 (E.D. Pa. July 2, 2015), ECF No. 1304 [hereinafter Reply Memorandum in Support of Rose Acre].

94. Memorandum in Support of Rose Acre, *supra* note 92, at 28-29.

95. 15 U.S.C. § 17; *see also* Memorandum in Support of Rose Acre, *supra* note 92, at 26.

96. *See* Consol. Express, Inc. v. N.Y. Shipping Ass'n, 602 F.2d 494, 520-21 (3d Cir. 1979). *See also* Feather v. United Mine Workers of America, 711 F.2d 530, 542 (3d Cir. 1983); *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1160-61 (3d Cir. 1993).

97. Memorandum in Support of Rose Acre, *supra* note 92, at 26.

belief that its conduct was protected by the Capper-Volstead Act, not on whether it believed its conduct was proscribed by the Sherman Act.[98]

In denying summary judgment, the court noted that nothing in the Capper-Volstead Act itself suggested that Congress intended to provide antitrust immunity based on a farmer's good faith belief that the cooperative qualified for the Capper-Volstead protections.[99] Interestingly, the court sympathized with the fact that a cooperative member could be exposed to crippling treble damages through no fault of its own.[100] The court referred to the lack of a statutory good-faith defense as a gaping hole in the law. Nevertheless, it stated that, until Congress plugs the hole, "diligent policing by co-operative members of the membership rules is the only available protection."[101] Given that some agricultural cooperatives include over 10,000 members, that is indeed an arduous task for the cooperative's administration.[102]

And, as in *In re Mushroom Direct Purchaser Antitrust Litigation*, the district court in *In re Processed Egg Products Antitrust Litigation* held that whether cooperative members believed in good faith that the cooperative was properly constituted was irrelevant and denied the defendants' motion for summary judgment on that basis.[103] In agreement with the district court in *In re Mushroom Direct Purchaser Antitrust Litigation* that the absence of a specific-intent requirement in the Sherman Act negates the existence of a good-faith defense, the district court in *In re Processed Egg Products Antitrust Litigation* described the defendants' argument, that the focus should instead be on the Capper-Volstead Act, as a "distinction without a

98. Reply Memorandum in Support of Rose Acre, *supra* note 93, at 52-53.

99. *See In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2016 WL 5539592, at *12-13 (E.D. Pa. Sept. 28, 2016).

100. *See id.* at *13.

101. *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2016 WL 5539592, at *13 (E.D. Pa. Sept. 28, 2016).

102. *See, e.g.*, *Our Farmers*, DAIRY FARMERS OF AMERICA [https://perma.cc/7GRX-D94H] (last visited March 11, 2021) (Dairy Farmers of America has over 13,000 members).

103. *Id.* The court had previously held that the cooperative, United Egg Producers ("UEP"), was not entitled to Capper-Volstead immunity because it counted at least one non-producer as a member. *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2016 WL 4922706, at *6 (E.D. Pa. Sept. 13, 2016).

difference."[104] Unfortunately, both courts confused "good faith" with intent. It is true that the antitrust laws do not require specific intent to restrain trade. But a "good faith" defense isn't based on the lack of intent to violate the antitrust laws, but rather in the belief that the conduct is covered by the antitrust immunity afforded by the Act. In other words, "specific intent" relates to why the defendant engaged in the conduct, while "good faith" simply relates to the reasonable belief that the conduct is immunized by the Act.

Finally, the district court in *In re Processed Egg Products Antitrust Litigation* emphasized that exemptions from the antitrust laws are to be narrowly construed. While true, the judiciary has accepted good faith defenses in a variety of other contexts.[105] The common thread in these decisions is the principle that, when Congress has seen fit to create industry-specific antitrust immunities, innocent participants that attempt to utilize those immunities in good faith should not be held liable. That same principle supports recognizing a good faith defense to antitrust liability under the Capper-Volstead Act.

C. Are Cooperative Efforts to Manage Supply Protected by Capper-Volstead?

As noted previously, the Act expressly permits the "collective[] processing, preparing for market, handling, and marketing" of agricultural products, and case law has extended the Act's protection to price-fixing.[106] Recent cases against farmer cooperatives have focused on activities that allegedly were designed to reduce the supply of the product, and thereby raise its prices, rather than a straightforward conspiracy to fix prices. The allegations include:

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104. *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 5539592 at *13.

105. *See, e.g.*, Feather v. United Mine Workers of Am., 711 F.2d 530, 542-43 (3d Cir. 1983) (labor); *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993) (Interstate Commerce Act); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 691 F.2d 678 (4th Cir. 1982) (healthcare); MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983) (telecommunications).

106. 7 U.S.C. § 291; Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 214 (9th Cir. 1974).

In re Mushroom Antitrust Litigation: Mushroom growers' cooperative allegedly purchased out-of-production mushroom farms and then imposed deed restrictions prohibiting future mushroom production.[107]

In re Processed Egg Products Antitrust Litigation: Egg producers' cooperative allegedly agreed upon, and implemented, an animal welfare program that included measures (including increasing cage space provided to egg-laying hens) that were designed to reduce the national number of hens, and hence the number of eggs produced.[108]

Edwards v. National Milk Producers Federation: Dairy cooperative allegedly paid producers to take cows out of production.[109]

In re Fresh and Process Potatoes Antitrust Litigation: Potato growers' cooperative allegedly instituted a voluntary program to reduce plantings.[110]

Though cooperatives can clearly choose when, at what price and even whether to sell their inventory,[111] plaintiffs have argued, to some success, that the Capper-Volstead Act does not protect efforts to reduce supply, especially when those efforts are employed prior to production.[112] In 2011, the district court in *In re Fresh and Process Potatoes Antitrust Litigation* issued an "advisory opinion" that Capper-Volstead does not protect pre-production (as opposed to post-harvest) supply control activities.[113]

In an article on the subject, Christine Varney, then Assistant Attorney General in charge of the Antitrust Division, outlined the arguments on both sides of the "production restrictions" issue and

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107. *In re* Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 689 (E.D. Pa. 2007).

108. *In re* Processed Egg Prods. Antitrust Litig.,851 F. Supp. 2d 867, 877-78 (E.D. Pa. 2012).

109. Edwards v. Nat'l Milk Producers Fed'n, No. 11 Civ. 4766, at *4 (N.D. Cal. July 19, 2012).

110. *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1148-49 (D. Idaho 2011).

111. In *Alexander v. Nat'l Farmers Org.*, the court indicated that the cooperative was permitted to withhold (destroy) products as a negotiation technique. 687 F.2d 1173, 1188 (8th Cir. 1982).

112. *In re Fresh & Process Potatoes Antitrust Litig*., 834 F. Supp. 2d at 1154.

113. *Id.* at 1152, 1154.

noted, "Courts have not provided definitive guidance on this issue, and there are well-reasoned arguments supporting each side."[114]

Terms used in the Capper-Volstead Act such as "preparing for market" can reasonably be interpreted to include planting decisions and collective decisions on how much to produce.[115] Indeed, the Fisherman's Collective Marketing Act ("FCMA"),[116] an exemption for fishermen modeled on the Capper-Volstead Act and which uses language almost identical to the Capper-Volstead Act, has been interpreted to protect fishermen who agreed not to fish.[117] In a Federal Trade Commission ("FTC") adjudication, FTC Chairman Paul Rand Dixon opined that fishermen who "s[at] on the beach" to create a shortage and force an increase in prices were found to be exempt; "Thus, so long as the members of a cooperative are acting pursuant to an agreement *voluntarily* entered into . . . they are to be considered a single entity for antitrust purposes, the same as an ordinary business corporation with a number of 'divisions.'"[118]

Logic and economic efficiency suggest that if destruction of harvested crops is permitted, pre-production restrictions should similarly be permitted[119]—prohibiting such conduct would be counterintuitive.[120] Telling farmers that they can manage supply only after they invest their money and resources in planting a crop, harvesting it, and then destroying it, makes little economic sense and runs counter to the antitrust laws' goals of promoting efficiency. Moreover, legislative history indicates that one purpose of the Capper-Volstead Act was to treat cooperatives like single corporate entities,[121] which, as Chairman Dixon noted in *In*

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114. Christine Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, THE ANTITRUST SOURCE, Dec. 2010, at 5.

115. *Id.* at 7.

116. 15 U.S.C. § 521 .

117. *In re* Washington Crab Ass'n, 66 F.T.C. 45, 1964 WL 73029, at *45, *59 (July 10, 1964).

118. *Id.* at *59. Some commentators, though, have noted that the FCMA also includes language authorizing cooperation in "catching" and "producing" fish. Varney, *supra* note 113, at 5.

119. Varney, *supra* note 113, at 7.

120. *Id*. at 7-8.

121. *See,* e.g., 62 CONG. REC. 2225 (1922) (statement of Sen. Lenroot); 62 CONG. REC. 2058 (1922) (statement of Sen. Capper).

re Washington Crab Association, are permitted to decide how much to produce.[122]

Those challenging Capper-Volstead immunity have nevertheless maintained that supply restrictions should be treated differently than price-fixing and are not exempt from the antitrust laws.[123] First, they argue that the Capper-Volstead Act does not expressly provide for supply restrictions.[124] That argument is not persuasive because the same is true for price-fixing. Second, some argue that supply and price-fixing are not simply two sides of the same coin.[125] Fixing prices at super-competitive levels may encourage producers to increase production, which would tend to decrease prices, whereas a pre-production agreement to affect supply has no such built-in mechanism that limits the effects of the alleged anticompetitive conduct.[126] The flaw in this argument is that, by the laws of supply and demand, price-fixing itself can only be maintained when supply is reduced to meet the new, fixed, market-clearing price.[127] Thus, cooperatives that have collectively set a price have already implicitly managed supply.

D. Does Vertical Integration Nullify the Exemption?

The Capper-Volstead Act applies to "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ."[128] Unfortunately, the Act does not define these terms or otherwise give guidance as to who qualifies as a "farmer." This is important because many modern-day farmers, like their cooperatives, engage in other activities that further process the agricultural products they grow, raise, or harvest.[129] The question is whether such vertical integration means these farmers no longer qualify for "farmer"

122. *In re* Washington Crab Ass'n, 66 F.T.C. 45, 1964 WL 73029 at *59 .

123. Varney, *supra* note 113, at 5.

124. *See, e.g.*, *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1154-55 (D. Idaho 2011).

125. *Id* at 1156.

126. *See, e.g.*, *id.* at 1156-1157.

127. Kleen Prods. LLC v. Int'l. Paper, 276 F. Supp. 3d 811, 827 (N.D. Ill. 2017).

128. 7 U.S.C. § 291.

129. *See Cooperatives,* NAT'L AGRIC. L. CTR., [https://perma.cc/G26B-T356] (last visited Jan. 27, 2021).

status under the Capper-Volstead Act.[130] Despite precedent supportive of vertical integration, the argument has been raised in *In re Mushrooms Direct Purchaser Antitrust Litigation*, *In re Fresh & Process Potatoes*, and *In re Processed Eggs Product Litigation*.

The Supreme Court in *Sunkist Growers v. Winckler & Smith Citrus Prod. Co.*, clarified that cooperatives may contain members who are vertically integrated.[131] Sunkist was an agricultural cooperative comprised of citrus growers and other agricultural cooperatives that handled the advertising, packing, and distribution of the members' fruit.[132] One of the agricultural cooperative organizations was owned and operated exclusively by a number of lemon-grower associations, all of which were also members of Sunkist.[133] The Court held that multiple cooperatives consisting of "the same growers and associations, cannot be charged with conspiracy among themselves."[134] In applying Capper-Volstead immunity to the entire cooperative organization, the Court held irrelevant that the packing, advertising, sales, and processing activities were completed through distinct divisions.[135] The Court stated, "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts."[136]

In *Case-Swayne Co., Inc. v. Sunkist Growers*, the Supreme Court considered a different aspect of the vertical integration question.[137] There, Sunkist, the grower cooperative, included members who were "packing houses" that were not actually owned by the citrus grower members.[138] The Court held that

130. *See* 7 U.S.C. § 291.

131. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 370 U.S. 19, 21 (1962).

132. *Id.*

133. *Id.* at 20.

134. *Id*.

135. *Id*. at 29.

136. *Winckler & Smith Citrus Prod. Co*., 370 U.S. at 29.

137. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 386–87 (1967).

138. *Id.*

"Congress did not intend to allow an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption."[139] As a result, Sunkist was not entitled to assert the exemption as a defense. Following this decision, Sunkist reorganized its structure and both parties moved the district court to determine whether the new structure brought Sunkist within the Capper-Volstead exemption.[140] The new structure did not allow the independent packing houses to hold membership or voting control in the cooperative, but vertically integrated producer members—citrus growers that own packing houses—were still valid members of the cooperative entity.[141] Under this structure, the district court held that the Sunkist cooperative was compliant with Capper-Volstead Act requirements.[142]

Similarly, agency decisions have noted that cooperatives with vertically integrated members qualify for the exemption.[143] In a business review letter, the Antitrust Division stated it had no intention of challenging a cooperative that included members that not only produced vegetables but also processed them in their own packing houses or in packing houses owned by other members.[144] The Federal Trade Commission has found that a cooperative in which members were involved in the growing and shipping of lettuce also met the requirements of the Act.[145]

The legislative history of the Act is also instructive. Congress considered the issue of whether a vertically integrated producer would still qualify as a producer under the proposed legislation and appeared to conclude it would.[146] For example,

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139. *Id*. at 395–96.

140. Case-Swayne Co. v. Sunkist Growers, Inc., 355 F. Supp. 408, 409 (D. C.D. Cali. 1971).

141. *Id*. at 414–15.

142. *Id*. at 415.

143. Business Review Letter from U.S. Dep't of Justice issued to Texas Produce Marketing Cooperative (Mar. 17, 1988).

144. *Id.*

145. *See In re* Cent. Cal. Lettuce Producers Coop., 90 F.T.C. 18, 1977 WL 288550 at *15-16 (Administrative Law Judge determining that the organization met the structural and organization requirements of Section 6 of the Clayton Act and the Capper-Volstead Act but ruling against the cooperative on price-fixing); *In* re Cent. Cal. Lettuce Producers Coop. 1977 WL 288550 at *33 (Commissioners setting aside decision on price-fixing and dismissing complaint). *See also* N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 985-986 (N.D. Cal. 1976).

146. 62 CONG. REC. 2121 (1922) (statement of Sen. Pomerene).

Senators Walsh and Pomerene recognized that vertically integrated producers/processors could join with other farmers.[147] In later remarks, Senator Walsh recognized that, under both proposed bills, the association:

> [M]ust be an organization of the producers themselves of the product of the farm. [The producers] may engage in marketing that product or they may engage in processing it for the purpose of putting it upon the market, but the proposed legislation would exclude a combination of producers of condensed milk who do not themselves produce it.[148]

Furthermore, one stated purpose of the proposed legislation was to bring farmers and consumers closer together.[149] Vertical integration would, in theory, eliminate at least one of the middlemen and improve producer returns.

Attacks on vertical integration persist, however, based primarily on remarks by Justice Brennan in his concurring opinion in *National Broiler Marketing Association*.[150] There, Justice Brennan opined that too much vertical integration could convert a farmer into a "processor" or "distributor" and imperil the exemption.[151] In delineating whether someone is rightfully considered a "farmer" and therefore enjoys antitrust immunity or whether she is a "processor" and lacks statutory protection, Justice Brennan stated the following:

> The statute itself may provide the functional definition of farmer as persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for

147. *Id.*

148. *Id.* at 2156 (statement of Sen. Walsh).

149. 59 CONG. REC. 7852 (1920) (statement of Rep. Morgan) ("We may safely encourage any system that will bring the producers and consumer in closer contact; that will provide a more efficient and more economical system of marketing, manufacturing, transporting, and distributing the products of the farm. The so-called middlemen cannot, of course, all be eliminated, but all unnecessary middlemen should be eliminated. The so-called middlemen should not be in a position to demand excessive profits. Our system of marketing should be such as will give to the farmers the greatest possible proportion of the wealth they produce.")

150. *See* Nat'l Broiler Mktg. Ass'n, v. United States, 436 U.S. 816, 832–36, 839 (1978) (Brennan, J., concurring).

151. *Id*.

> cooperative handling, processing, and marketing. Thus, in my view, the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an association is exempt.[152]

Two district courts have subsequently cited the Brennan test.[153] In *United States v. Hinote*, the district court found that two of the alleged conspirators (one of which was a subsidiary of ConAgra) were primarily processors and thus, denied the exemption.[154] In the more recent decision, *In re Fresh and Process Potatoes Antitrust Litigation*, the district court held that a better-developed record was necessary.[155] No appellate court has had an occasion to opine on, or apply, Justice Brennan's test.[156]

E. Who is a Farmer?

As discussed, only farmers qualify for the Capper-Volstead Act's exemption, but the Act provides little guidance on who may qualify as a farmer. In *In re Processed Egg Products Antitrust Litigation*, the plaintiffs moved for summary judgment, claiming that certain cooperative members were simply distributors, rather than farmers.[157] These entities did not own the land on which the hens were raised, nor did they own the hens themselves.[158] Instead, they had a contractual relationship with companies that owned the egg-laying hens whereby they raised and cared for the hens and purchased the eggs and then packaged and resold the eggs.[159] Defendants argued that because the member actively

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152. *Id*. at 836.

153. United States v. Hinote, 823 F. Supp. 1350, 1355 (S.D. Miss. 1993); *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1153 (D. Idaho 2011).

154. *Hinote*, 823 F. Supp. at 1359.

155. *In re Fresh & Process Potatoes Antitrust Litig*., 834 F. Supp. 2d at 1154.

156. In its Statement of Interest in the *Sitts* case, the Antitrust Division suggested that if the challenged conduct was being pursued by the defendant in its capacity as a "handler or processor," then immunity should not be available. Statement of Int. on Behalf of the U.S. *supra* note 51, at 8.

157. *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2016 WL 4922706, at *1, *2 (E.D. Pa. Sept. 13, 2016).

158. *Id.* at *2.

159. *Id.*

managed the egg production at the farms from which they purchased the eggs and were deeply involved in the husbandry of the hens, they qualified as a "farmer."[160]

In holding that the member did not qualify for farmer status, the court in *In re Processed Egg Products Antitrust Litigation*[161] court cited *National Broiler Marketing Association*,[162] saying the *"*Court held that members of a cooperative which neither owned breeder flocks nor hatcheries and maintained no grow-out facilities where flocks to which they had titled were raised, could not be considered 'farmers' for purposes of the Act."[163] The court went on to hold that because the member did not own any of the farms where its eggs were produced, "this arrangement is indistinguishable from a preplanting contract, which the Court in *National Broiler* held was not the kind of investment Congress intended to protect under Capper-Volstead."[164]

Ownership of the farmland is certainly a factor in determining "farmer" status. It makes little sense, though, to allow ownership of land to be the sole criteria in this determination, which would exclude leasehold farmers and sharecroppers, while ignoring traditional farming activities such as husbandry of livestock.

IV. BARGAINING POWER–THEN AND NOW

The question can fairly be asked: Has the Capper-Volstead Act outlived its usefulness? After all, many agricultural cooperatives are big businesses nowadays.[165] Indeed, plaintiffs in the cases challenging the application of the Capper-Volstead Act make this argument, both implicitly and explicitly.[166]

The fact remains that agriculture is different from other industries. Production of agricultural products has a far longer

160. *Id.* at *13.

161. *See In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 4922706, at *5.

162. *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827-28 (1978).

163. *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 4922706, at *5.

164. *Id.* at *5.

165. U.S. DEP'T OF AGRIC. ERS, FARMING AND FARM INCOME, [https://perma.cc/USU6-X8YS] (last visited Nov. 2, 2018).

166. Transcript of Oral Argument at 268, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002 (E.D. Pa. 2016).

lead time than its manufactured counterparts, due to the need for planting and harvesting, in the case of crops, or birthing and rearing animals, in the case of livestock.[167] Additionally, Mother Nature, always a fickle variable, plays a huge role in the success or failure of any year's yield. And, of course, these products are generally perishable. Given that these products form the very basis of the foodstuffs we consume daily, agriculture has always enjoyed special legislative protection.

Nevertheless, it was the imbalance in bargaining power between the buyers of the agricultural products and the individual farmers who produced them that spurred the passage of the Capper-Volstead Act. And, though agricultural producers have grown in size, so have their customers, resulting in the same relative imbalance today.

In the early 1920s, when the Capper-Volstead Act was under consideration, there were approximately 6,448,000 farms in the United States.[168] These were small farms that often found themselves at the mercy of middlemen and buyers due to a lack of bargaining power and the perishable nature of their products.[169] As farm prices became depressed, farmers were abandoning their farms to move to cities. Consumers and legislators were concerned about potential food shortages. The power of the buyers over the individual farmers impelled the passage of the Act.[170]

The modern era has been marked by the consolidation of buyers and farm units alike. As the Department of Justice was conducting a series of workshops into antitrust issues affecting agriculture, food retail, and processing companies continued along a path of rapid consolidation.[171] By 2009, the top food

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167. *Cf.* Brian Scott, *Planting is over. Now what do farmers do?*, THE FARMER'S LIFE (June 6, 2015, 12:57 PM), [https://perma.cc/FQ9Z-TBK8].

168. U.S. DEP'T OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, AGRICULTURE vol. 5, 24.

169. In the Sixty-seventh Congress, Senator Lenroot stated, "[W]e are justified in enacting this legislation which will enable the farmers of this country to put themselves somewhat nearer an equality of bargaining power and control of output in production that other industries have to-day." 180. 62 CONG. REC. 2225 (1922) (statement of Sen. Lenroot).

170. Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 451, 497 (2015).

171. *Consolidation and Buyer Power in the Grocery Industry*, FOOD & WATER WATCH (Dec. 2010), [https://perma.cc/G7PP-M6JY].

retailers—Wal-Mart, Kroger, Costco, and Supervalu—controlled more than half of all grocery sales in the United States.[172] Consolidation has thus given top retailers considerable purchasing power as wholesale buyers of groceries, and many food-processing firms justify their mergers as an effort to create stronger bargaining power with these large retailers.[173] The number of farmers has declined by over two-thirds, from nearly 6.5 million in the 1920s, to 2.06 million in 2016.[174] At the same time, cooperatives have consolidated into larger units and their customers have become national and international enterprises.[175]

In 2010, the U.S. Department of Agriculture ("USDA") and Department of Justice held a series of workshops ("Workshops") around the country entitled "Exploring Competition Issues in Agriculture."[176] At the June 25, 2010 Workshop in Madison, Wisconsin, Robert Cropp, Professor Emeritus of Agriculture and Applied Science at the University of Wisconsin, presented data indicating that the bargaining power imbalance that the Capper-Volstead Act was designed to correct is just as prevalent today, if not more so.[177] For example, in 2010, Wal-Mart topped the Fortune 500 list with food revenues of approximately $230 billion.[178] By contrast, total revenue of all dairy cooperatives in the country was less than $40 billion, with the largest dairy cooperative having sales of $10 billion.[179] In 2010, the largest agricultural cooperative, CHS, Inc., had revenues of $26 billion.[180] A number of their customers are on the Fortune 500 list, including Kroger, SuperValu, and Kraft. Each of these

172. *Id.*

173. *Id.*

174. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., FARMS AND LAND IN FARMS 2016 SUMMARY (Feb. 2017) at 4.

175. Andrew Grant, *Five trends and their implications for agricultural coops*, MCKINSEY (2012), [https://perma.cc/2M89-3SQ3].

176. Press Release, U.S. Dep't of Justice, Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry (Aug. 5, 2009), [https://perma.cc/JD7A-E8ZG].

177. Transcript of Record at 191:9-198:5, U.S. Dep't of Justice & U.S. Dep't of Agric., Dairy Workshop: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplace (June 25, 2010), [https://perma.cc/H4ST-78M5].

178. *Id.* at 193:3-6.

179. *Id.* at 193:12-19.

180. *Id*. at 193:7-11.

entities have revenues that are large multiples of those of the largest cooperatives.[181]

Furthermore, there has been a great deal of consolidation in the retail grocery industry. Progressive Grocer's Super 50 list of the largest grocery chains does not include membership clubs such as Sam's, Costco, and BJ's.[182] Yet, as reported in May 2018, the combined annual sales of the Super 50 grocers still tops $580 billion.[183] The top ten, which includes Wal-Mart, Kroger, and Safeway, accounts for more than seventy-seven percent of those sales, or approximately $450 billion.[184] Similarly, Associated Wholesale Grocers, a buying group not even included in the Super 50, had revenues of approximately $9.2 billion in 2016.[185]

In comparison, according to a study by the USDA, combined revenues of all United States agricultural cooperatives topped $212 billion and the one hundred largest agricultural cooperatives in the United States reported combined revenues of $146 billion in 2015—a fraction of the combined revenue of just the top ten retail grocers.[186] Just as they were ninety-nine years ago, today's farmers are still confronted with the disproportionate bargaining power of their huge customers.[187] Consequently, the very conditions that compelled passage of the Capper-Volstead Act back in 1922 prevail today.

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181. *Id.* at 193:15-17.

182. Jim Dudlicek, *Top 50 Grocers: Amazon in 8th Place While Rest of Industry Restrategizes, Reshuffles*, PROGRESSIVE GROCER, [https://perma.cc/8LFD-2VBW].

183. *Id.*

184. *Id.*

185. ASSOCIATED WHOLESALE GROCERS, INC., 2016 ANNUAL REPORT 3 (2017), [https://perma.cc/LZN9-65GH].

186. U.S. DEPARTMENT OF AGRIC., RURAL DEV., AGRICULTURAL COOPERATIVE STATISTICS 2015 6-7 (2017), [https://perma.cc/5DYM-MMVR].

187. Just recently, the Center for Science in the Public Interest, a consumer advocacy group, requested that the Federal Trade Commission investigate the grocery retail industry with respect to a number of practices. As one example of the retailers' power, the group claims that the practice of charging trade promotion fees prevents farmers from being able to locate their products in prime store locations. Hon. Rebecca Slaughter, et. al., *Request to Investigate Trade Promotion, Category Captain, and Online Retail Practices in the Grocery Retail Industry,* CENTER FOR SCIENCE IN THE PUBLIC INTEREST (Feb. 19, 2021) [https://perma.cc/6GYV-YE93]

V. IMPACT ON FOREIGN LAW

The United States is not the only country to have adopted an agricultural policy designed to afford certain protection to farmers; under the European Union's common agricultural policy, certain behavior and practices by agricultural producer organizations, which might otherwise be considered as anticompetitive, are excluded from the scope of the European Union's competition rules.[188] It is not surprising, therefore, that current attempts to undermine and weaken the American farmers' antitrust exemption could easily have international implications. Numerous foreign countries already use the United States' antitrust law as a model, and several have adopted antitrust exemptions for agricultural cooperatives similar to the Capper-Volstead Act.[189] Farmers in developing economies have faced or will eventually face the same challenges as those that confronted American farmers at the time the Capper-Volstead Act was passed.[190] They deserve the same protection. Their governments could easily adopt restrictive rulings from United States courts,[191]

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188. *See*, *e.g.*, Luis A. Gomez and Rachel Cuff, *ECJ Clarifies Agriculture Exclusion of EU Competition Rules: Endive Producers Must Turn Over a New Leaf*, LEXOLOGY (Nov. 29, 2017), [https://perma.cc/TD5P-MRQY].

189. For example, Japan's Anti-Monopoly Law of 1947, following the example of the Capper-Volstead Act, exempts certain agricultural cooperatives from its application. *See* Hiroshi Ashino, *Experimenting with Anti-Trust Law in Japan*, 3 JAPANESE ANN. INT'L L. 31, 31 (1959); Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM. L. & POL'Y J. 59, 66 (1995). Agricultural cooperatives in Europe are similarly exempted from liability under Article 81 of the European Community ("EC") Treaty—Europe's analog to the Sherman Act—by Regulation 26, adopted by the EC Council in 1962. Arie Reich, *The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation*, 42 TEX. INT'L L.J. 843, 849-50 (2007). The United Kingdom's Competition Act of 1998 contains an exemption for agricultural cooperatives patterned on the EC's Regulation 26. *Id.* at 856. And Israel, which regulates competition under its Restrictive Trade Practices Law of 1988, provides an exemption to agricultural cooperatives under Article 3(4) of that Law. *Id*. at 857-58.

190. SERGE ADJOGNON & ANWARD NASSEM, INSTITUTE FOR THE STUDY OF INTERNATIONAL DEVELOPMENT, CONTRACT FARMING AS A TOOL FOR POVERTY REDUCTION IN AFRICA 2-3, [https://perma.cc/275L-XSYY]

191. Indeed, foreign courts often find U.S. case law instructive in interpreting their own antitrust laws. *See, e.g.,* Rural Press Ltd. v Australian Competition and Consumer Comm'n, (2003) 216 CLR 53, 88 (Austl.) (holding market-sharing arrangements *per se* invalid under the Australian Trade Practices Act, citing favorably to United States case-law holding such arrangements to be *per se* violations of the Sherman Act); R. v. Bugden's Taxi

which could keep their farmers from achieving effective collective bargaining power.

International efforts have been underway to aid the development of farmer cooperatives and the laws that protect their activities. In a May 2012 report, the European Competition Network ("ECN") noted concerns about price volatility and competitiveness in food production and distribution.[192] Some national competition authorities believe that cooperation among producers and the creation of cooperatives would increase competition in the food sector.[193] By 2013 these concerns led to the European Union's adoption of significant reforms to its Common Agricultural Policy (the "CAP") that set new rules for allowing joint-selling by producers in the agricultural sector.[194] In November 2015, the European Commission adopted guidelines on potential competition issues arising in the implementation of these new rules as they pertain to the olive oil, beef and veal, and arable crops sectors.[195] CAP reform removed production restraints to encourage farmers to base their production decisions on market signals.[196] The legal framework

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(1970) Ltd., 2007NLTD167 at para. 24 (N.L. Sup. Ct.–Trial Div.) (describing Canada's Competition Act as creating a "partial rule of reason" by way of analogy to United States case law interpreting the Sherman Act); Cases C-468/06 to C-478/06, Sot Lelos kai Sia EE v. GlaxoSmithKline AEVE Farmakeftikon Proionton, 2008 E.C.R. I-07139, ¶ 65; Commerce Comm'n v. Caltex New Zealand Ltd., [1998] 2 NZLR 78 at [83-84] (looking to *United States v. Socony-Vacuum Oil Co., Inc*., 310 U.S. 150 (1940) to determine what constitutes price fixing); Am. Natural Soda Ash Corp. v. Competition Comm'n of South Africa, 2005 (9) BCLR 862 (SCA) at para. 50 (looking to *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1 (1978) to determine what constitutes price fixing); Institute of Independent Ins. Brokers v. Director General of Fair Trading, [2001] CAT 4, 1003/2/1/01, ¶ 174 (U.K. Competition Comm'n Appeal Trib. Sept. 17, 2001) (citing cases implying a rule of reason borrowed from United States. case-law in the interpretation of Article 81(1) of the EC Treaty).

192. *See* EUROPEAN COMPETITION NETWORK, ECN ACTIVITIES IN THE FOOD SECTOR: REPORT ON COMPETITION LAW ENF'T AND MARKET MONITORING ACTIVITIES BY EUROPEAN COMPETITION AUTHS IN THE FOOD SECTOR 18 (2012), [https://perma.cc/P4WD-QAK7]

193. *Id*. at 10.

194. EUROPEAN COMMISSION, AGRICULTURAL POLICY PERSPECTIVES BRIEF NO. 5. OVERVIEW OF CAP REFORM 2014-2020 (2013), [hereinafter CAP] [https://perma.cc/445Q-K5TR]

195. *See Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors*, 2015 O.J. (C 431) 4, [https://perma.cc/FR24-S5N6].

196. CAP *supra* note 194, at 5.

under CAP reform also "extend[ed] the possibility for collective bargaining (in some [agricultural] sectors) and delivery contracts (for all [agricultural] sectors) to [p]roducer [o]rganisations, their [a]ssociations and Inter Branch Organisations."[197]

The U.S. Overseas Cooperative Development Council (funded by USAID) is conducting a major initiative called the "Cooperative Law and Regulation Initiative" ("CLARITY").[198] Part of that initiative involves providing assistance to help national cooperative movements organize themselves, and helping to evaluate and improve their cooperative laws.[199] CLARITY points to the Capper-Volstead Act as an exemplar for implementing exemptions from competition law that would otherwise prohibit certain joint action between businesses for cooperatives.[200]

VI. CONCLUSION

The more things change, the more they stay the same. As true now as it was in the 1920s, the number of farms continues to decline. Farmers and their cooperatives are still at the mercy of power buyers, Mother Nature, and the international marketplace. There is still a large imbalance of bargaining power. In short, the same conditions and concerns that existed at the time the Capper-Volstead Act was passed continue to this day.

As the Supreme Court stated in *Maryland and Virginia Milk Producers Association v. United States*:

> We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive

197. *Id.* at 5 n.7.

198. *See* THE COOPERATIVE LAW AND REGULATION INITIATIVE, [https://perma.cc/LX7W-EN9B] (last visited Jan. 28, 2021).

199. *Id.*

200. U.S. AGENCY INT'L DEV., ENABLING COOPERATIVE DEV., PRINCIPLES FOR LEGAL REFORM 17 (2006), [https://perma.cc/RAK7-2UXC] (last visited Mar. 4, 2018).

> advantage–and responsibility–available to businessmen acting through corporations as entities.[201]

That rationale continues to apply today. Nevertheless, power buyers and other opportunistic interests continue to enlist the courts in eroding the basic foundations of the exemption, and the implications will have far reaching effects. The bargaining power and economic viability of farmers and their cooperatives will be undermined here and abroad as foreign governments and their courts follow the lead of the United States. Aggressive legal attacks on the very foundations of cooperatives themselves are being waged and hope now rests with the higher courts or Congress.

201. Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960).