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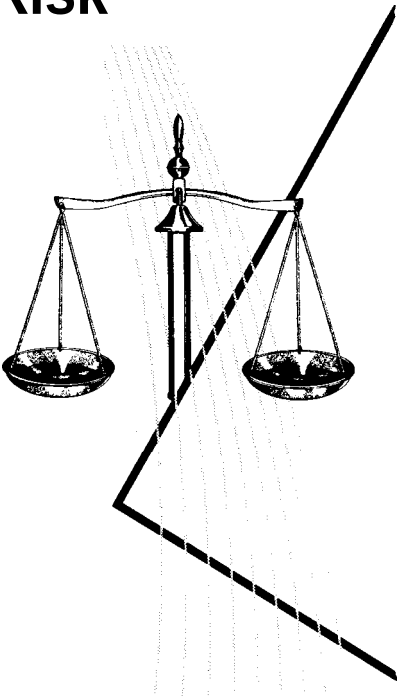
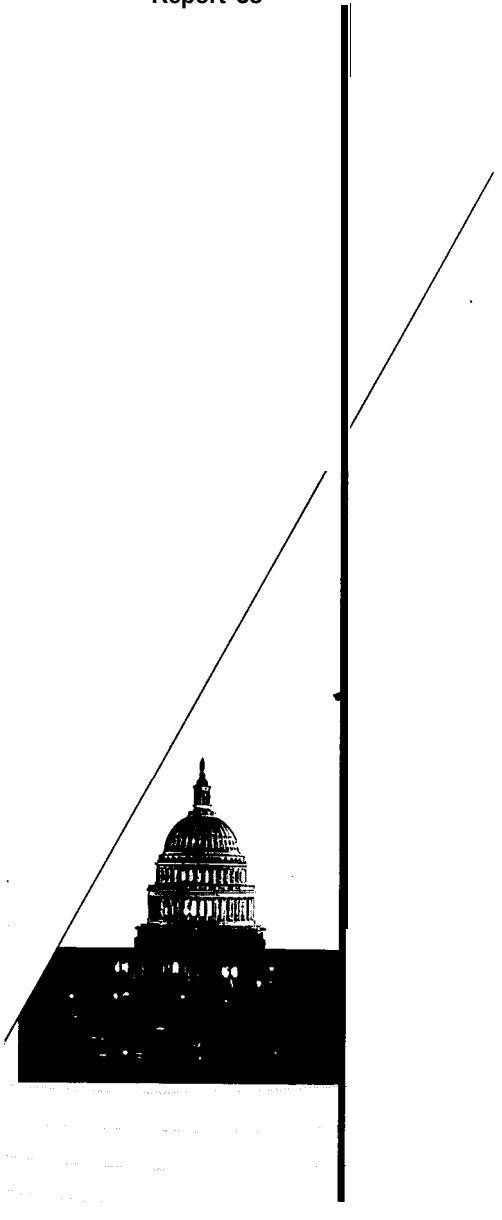
Managing, Cooperative Antitrust Risk





ABSTRACT

Managing Cooperative Antitrust Risk

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This report explains the essentials of antitrust law and why limited antitrust protection granted in the Capper-Volstead Act is critical to cooperative marketing by agricultural producers. It outlines who is covered by Capper-Volstead, how a cooperative must be organized to qualify for limited antitrust protection, and what types of activity are protected. It also discusses several areas that pose special antitrust risks for farmer cooperatives and other points of law cooperative leaders must be aware of to successfully manage their antitrust risk.

Key Words: cooperative, antitrust, Capper-Volstead Act, law, management, risk

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PREFACE

While an antitrust problem is not inherent in every decision made by a cooperative's management team, one mistake can cause a cooperative to become embroiled in exhausting, costly, and embarrassing litigation. Ideally, every cooperative would have an antitrust expert on hand to review the exposure associated with each important management decision. But in the real world, a limited number of antitrust experts are available and their time can be costly.

This report will help cooperative directors, managers, and advisers with limited experience in antitrust problems cope with the issue of managing antitrust risk. It is not intended to help them handle major antitrust problems, but to help them avoid inadvertent violations of the antitrust law, recognize conduct that poses an antitrust risk, and make decisions that limit antitrust exposure.

The author gratefully acknowledges the contributions of four experts in cooperative law--James Baarda, Dale Cunningham, Donald Graham, and Wayne Hoecker. Many of the real insights are from their comments.

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HIGHLIGHTS

Every management decision carries with it some risk of legal action. Open access to the courts is a fundamental right in this country, and all cooperative leadership can do is discourage litigation by positioning their association to win any suit as swiftly and decisively as possible.

Antitrust law poses a special litigation risk to agricultural marketing cooperatives. The courts have held that certain conduct by independent businessmen--agreeing on prices, terms of sale, and whom to sell to--amounts to a per se violation of the Sherman Antitrust Act. And this is the conduct that farmers undertake through their marketing associations,

The Capper-Volstead Act provides a limited antitrust exemption for agricultural marketing associations. Capper-Volstead protection is available only to associations that (1) limit membership to bona fide agricultural producers, (2) either limit members to not more than one vote because of the amount of stock owned or limit dividends on membership capital to 8 percent per year, (3) do a majority of their marketing for association members, and (4) operate for the mutual benefit of their members as producers.

Producers whose cooperative meets these requirements can agree on prices and terms of sale, select the extent of their joint marketing activity through their association, agree on common marketing practices with other cooperatives, and achieve substantial market share and influence.

Because Capper-Volstead does not provide total antitrust exemption, cooperative managers, directors, and advisers must make decisions that sometimes expose the organization to antitrust risk. Risk is usually greatest when the decision involves business arrangements with persons and firms that are neither agricultural producers nor cooperative associations of producers.

Business arrangements that pose special antitrust risk for cooperatives include agreements on prices and terms of

sale, undue price enhancements, reaching for substantial market share, merger and acquisition activity, customer selection, member selection, transportation, limitations on quantity of product handled, and predatory conduct.

While supply cooperatives may not qualify for Capper-Volstead protection, they have avoided the types of restraints of trade that courts find unreasonable and thus illegal.

When assessing the antitrust risk of a business decision, cooperative leaders should keep certain considerations in mind. These include the fact that leaders and advisers can be personally liable if the association is found guilty of an antitrust violation. Also, private parties injured by illegal anticompetitive conduct can recover three times the extent of their injury. State antitrust laws may also impose liability.

Antitrust risk can neither be ignored nor permitted to paralyze business planning. It must be understood and managed if cooperatives are to fulfill their objective of assisting producers to enhance their overall farming operation.

MANAGING COOPERATIVE ANTITRUST RISK

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> "It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. In such a case he is not held to act unlawfully and without justifiable cause.
>
> "The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged" **1/**

The above statement, by famous jurist Oliver Wendell Holmes, captures the essence of the relationship between rural America and our antitrust policy. It is relatively easy to start most businesses that serve rural areas. The emergence of a new competitor, or the possibility that a new competitor will be started if existing businesses act inefficiently or irresponsibly, is the primary protection for the public.

The development of agricultural cooperatives is naturally compatible with this policy. Farmers individually may not have the time or resources to start a new firm to compete with existing providers of supply and marketing services. But when new competition is required to protect their farm income, they can unite in a cooperative to provide that service.

While cooperatives are procompetitive factors in the marketplace, they have characteristics that make it difficult to apply antitrust policy to them. This creates special problems for cooperative leaders who must evaluate antitrust implications of their management decisions.

1/ Vegelahn v. **Guntner, 44 N.E. 1077. 1080 (Mass. 1896).** dissenting opinion.

AN ACCEPTABLE LEVEL OF RISK

Open access to the courts, by Government agencies and private citizens, is a fact of life for American business. There is no strategy that can guarantee protection for any business, including agricultural cooperatives, from being sued. And the consequences, in terms of drains on resources and management time, can be enormous. As one judge stated, "The filing of a complaint in a Federal court is, in effect, a license to the plaintiff to subject the defendant to the expense and difficulties of extensive discovery proceedings." 2/

Cooperative leaders and advisers have a responsibility to take the risk of litigation into account when making management decisions. The objectives of prudent litigation risk management policy might be to minimize the chances of being sued, minimize the likelihood of losing a lawsuit, and position the cooperative to successfully resolve litigation as quickly as possible at the lowest possible cost, both in terms of money and prestige.

Antitrust litigation is a particular risk for agricultural marketing cooperatives. A primary reason farmers join marketing cooperatives is their desire to remain independent businesspeople while eliminating competition among themselves over prices and other terms of sale. And this is the very type of conduct antitrust laws are intended to eliminate.

Because antitrust is a legal problem, risk management should be approached from a legal perspective. A cooperative that sets its goal as total avoidance of litigation is probably being too conservative. It may shun legal business opportunities out of undue fear that a competitor or Government agency will sue.

As a general rule, the major cost of defending an antitrust suit is preparation for trial. This is because distinguishing between legal conduct by a vigorous competitor and illegal conduct is often subtle. This distinction often turns upon factual determinations involving intent and the presence or absence of a legitimate economic justification for the conduct. The evidence is usually circumstantial and buried in business records or the recollections of persons only incidentally involved in the matter under review. Discovering,

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2/ Honorable Archie 0. Dawson, "Seminar on Protracted Cases." 23 F.R.D. 325.431 (1958).

analyzing, and organizing the relevant economic evidence can be prohibitively expensive.

Therefore, the goal of all but the most aggressive associations should be to have any antitrust suit against them dismissed before trial. In technical parlance, this usually means being in position to have the court grant a motion for summary judgment.

A motion to dismiss a case on summary judgment can be made by, and granted to, any party to a lawsuit. The motion is a request that the court rule that even assuming the facts are as alleged by the other side, the person making the motion wins the case as a matter of law.

Summary judgment can be awarded in antitrust cases as in other litigation. While the Supreme Court has said summary judgment should be granted sparingly in complex antitrust cases, this should not discourage cooperatives from seeking this route because of the reduced legal costs involved. 3/

The hazard of litigation doesn't mean every management decision must be dissected looking for potentially grave antitrust consequences. In most instances, there simply aren't any. Rather, cooperative leaders should become familiar enough with antitrust principles to recognize when an antitrust problem is possible so they do not inadvertently violate the law.

Not surprisingly, a cooperative that adopts a policy of being in position to quickly resolve antitrust suits in its favor is also going to minimize the probability of being sued at all and of ultimately losing an antitrust suit.

To follow this policy--or to be more aggressive and test the limits of permissible conduct--cooperative leaders must understand the development of antitrust law, including agriculture's role in that development; be knowledgeable about statutes enacted to protect cooperative marketing; know how a cooperative must be organized and operated to qualify for protected status; and be able to recognize situations where exposure may be great.

This report provides information in these areas at a level of

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3/ Tillamook Cheese and Dairy Ass'n v. Tillamook County Creamery Ass'n. 358 F.2d 115, 117 (9th Cir. 1966).

detail appropriate for use by cooperative directors and managers and by professional advisers with limited experience in cooperative antitrust issues. It will not make the user an expert in antitrust law. Whenever a situation with antitrust implications is identified, the only prudent response is to contact a competent attorney with special skills in this area of the law, preferably one knowledgeable about both cooperatives and the services the cooperative provides.

DEVELOPMENT OF ANTITRUST LAW

Our antitrust law, like most of our legal traditions, is founded on English common law. When common law was developing, the "trades" were tightly controlled by guilds and towns. If someone entered into an agreement not to practice his trade, he might become a burden on the public. Therefore, the courts refused to enforce any contract that "restrained trade."

This view was gradually relaxed, and by the early 18th century, agreements in restraint of trade were enforceable if reasonably related to a lawful transaction. Gradually the pendulum moved to the other extreme, and the common law of trade restraint became largely a dead letter.

After the Civil War, industrial leaders in the United States took advantage of the hands-off attitude adopted by our courts and mounted a serious challenge to free competition. Persons in the same line of business, including industries important to farmers--steel, petroleum, farm machinery, sugar, cotton oil, and tobacco--formed "trusts."

A "trust" was an early version of the holding company. Controlling blocks of stock in previously separate (and usually competing) companies were placed in a trust under the control of a single board of trustees. The trustees could then control virtually an entire industry, by controlling the output and prices of all the largest producers. Farmers, particularly in the South and West, responded to the trusts by organizing the so-called Grange movement. They used their political influence to play an important part in securing first State and then Federal laws to limit the power of the trusts. While the trust is now an archaic form of business structure, the term "antitrust" has survived to describe laws aimed at protecting the competitive market system.

The Sherman Act

The Sherman Act of 1890, the first Federal antitrust law, remains the most important such act. 4/ Most antitrust suits against cooperatives allege violations of sections 1 and 2 of this act.

Section 1 makes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . illegal." 5/

This section also states that any person who makes a contract or engages in a combination or conspiracy to restrain trade is guilty of a felony. While criminal sanctions are not frequently invoked, it would be unwise to ignore the possibility that willful violaters may be subjected to heavy fines and possible incarceration.

Section 1 reaches not only the traditional "cartel" or "horizontal" arrangements between competing firms engaged in the same level of production or distribution. It also covers agreements between firms at different levels of the production and distribution system, such as between producers and processors, often called "vertical" agreements.

Section 2 states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony. " 6/

This section is aimed at preventing a single firm, or a combination of firms, from acquiring the power to fix prices or eliminate competition.

The Federal Trade Commlsslon and Clayton Acts

The Sherman Act was drafted in broad, constitutional terms. Cooperative leaders need to be familiar with two additional Federal laws, both enacted in 1914, that supplement the Sherman Act by prohibiting specific restraints of trade and establishing additional

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4/ 15 U.S.C. 1-7.

5/ 15 U.S.C. 1. Section 3 of the Sherman Act, 15U.S.C. 3, makes section 1 applicable to commerce involving the District of Columbia.

6/ 15 U.S.C. 2.

enforcement tools. They are the Federal Trade Commission Act 7/ and the Clayton Act. 8/

The Federal Trade Commission Act created an independent regulatory commission to eliminate unfair methods of competition in their inception, before they substantially lessen competition. The act was later amended to also prohibit unfair or deceptive acts or practices.

The Clayton Act was passed to make it clear that no matter how the sweeping language of the Sherman Act was interpreted, certain specific acts were unlawful when their effect was to substantially lessen competition or to tend to create a monopoly. These included discrimination in price (section 2). use of exclusive dealing arrangements and tie-in sales requiring a purchaser of a desired commodity to purchase other goods as well (section 3), and acquiring the stock or assets of a competitor (section 7).

The Clayton Act also authorizes private persons injured by any violation of the antitrust laws, including the Sherman Act, to sue and recover treble damages and attorneys fees (section 4) and holds directors, officers, and agents personally liable for a corporation's violation of any criminal provision of any antitrust law (section 14).

INTERPRETATION OF ANTITRUST LAWS

When Congress passed the Sherman Act, it seemed to be influenced by the earliest common law traditions of trade restraint. The act forbids any agreement that restrains trade and any act tending to monopolize commerce.

At first, the Supreme Court applied the Sherman Act prohibition of all trade restraints literally. 9/ However, when the series of major antitrust cases started by President Theodore Roosevelt came before the court, it found that practical application of the Sherman Act called for substantial interpretation.

7/ 15 U.S.C. 41-58.

8/ 15 U.S.C. 12-27.

9/ United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897).

When applying the antitrust laws to specific situations, particularly the broad language of sections 1 and 2 of the Sherman Act, courts have relied on two contrasting yet complementary rules, the rule of reason and the rule of per se illegality.

The Rule of Reason

A literal reading of the Sherman Act prohibition of every agreement in restraint of trade could lead to the absurd conclusion that all commercial contracts are prohibited, since all contracts limit the freedom of the parties to some extent and thereby "restrain" trade.

Likewise, section 2 would prohibit any monopolization, even in small rural communities where there may be only enough customers to support one pharmacist, a single funeral parlor, dairy, and so forth.

To avoid this abnormality, the courts adopted the rule of reason as a basic standard for interpreting the Sherman Act. The rule of reason means sections 1 and 2 only prohibit contracts, combinations, and conspiracies that "unreasonably" or "unduly" restrain or monopolize trade. 10/

Determining if conduct is an "unreasonable" restraint of trade that violates section 1 of the Sherman Act often requires an intense and subjective analysis of the facts in the case. Courts look at facts peculiar to the business, the history of the restraint, the reasons why it was imposed, and the economic consequences of restraint. The purpose of the analysis is to determine the competitive significance of the restraint; that is, is it an unjustifiable or substantial interference with the free market the law is supposed to protect.

Similarly, section 2 of the Sherman Act is interpreted to require an analysis of the purpose of the party or parties and the means employed to obtain monopoly power.

10/ Standard Oil Company v. United States, 221 U.S. 1 (1911); Board of Trade of the City of Chicago v. United States, 246 U.S. 23 1 (1918).

The Rule of Per Se Illegality

The development of the rule of reason was balanced by the contemporaneous recognition that certain acts are so anticompetitive and without business justification that a lengthy and burdensome trial to establish their unreasonableness was not justified. If the act itself was proven, the court automatically found the conduct illegal. Such conduct is labeled "illegal per se."

The rule of per se illegality is most frequently applied to agreements to fix prices and divide markets (both territories and customers).

The earliest decisions finding per se illegality were in cases that involved price fixing, market division, and marketpower. 1 1/

However, subsequent decisions have held either price fixing 12/ or market division 13/ can be illegal per se without proof of market power or adverse impact on competition.

The per se rule has a substantial potential impact on agricultural marketing cooperatives. A logical application of the rule of reason would place much cooperative marketing by agricultural producers outside the scope of the antitrust laws. Their collective activity would not result in enough market power to significantly restrain trade. Risk would be limited except for an association that somehow acquired sufficient market power to control prices and eliminate competitors, and for cooperatives who conspired with other businesses to restrain or monopolize trade.

But the farmer members of virtually every marketing cooperative, regardless of how new or limited in scope, agree on prices and collectively decide to whom they will sell their products.

Because this conduct is conclusively presumed to be illegal, an agricultural cooperative defending an antitrust suit is precluded from introducing evidence showing a legitimate economic objective being pursued by the cooperative.

11/ United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified as to decree and affd, 175 U.S. 211 (1899); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

12/ United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

13/ United States v. Topco Associates, 405 U.S. 5% (1972).

This exposes farmers to considerable antitrust risk unless their joint marketing activity is conducted in a manner exempt from antitrust prohibitions. As one judge phrased it:

"It is clear that if individual agriculturalists, through the medium of a cooperative, jointly fixed prices, reasonably or otherwise, *without statutory authorization, they* would be subject to prosecution." (emphasis added) 14/

Thus the need for statutory protection for cooperative marketing is self-evident.

COOPERATIVE ANTITRUST PROTECTION - BACKGROUND

When the Sherman Act was being considered in Congress, the development of cooperative marketing associations was in its infancy. A few alert legislators foresaw the proposed language could cripple efforts of farmers to create organizations strong enough to protect their interests in the marketplace. 15/

Senator Sherman even proposed an amendment providing the act:

"... shall not be construed to apply to . . . any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products." 16/

The amendment was not adopted. Senator Sherman was persuaded by his colleagues that no one would consider applying the antitrust statute to agricultural producers. Many legislators felt it was important not to limit the applicability of the new law in any way. In view of the embryonic state of cooperative marketing at the time, it is remarkable that their status was considered at all.

Developments in the early 1900's raised doubts among agricultural leaders about the adequacy of the Sherman Act. First, the evolution of the rule of reason created concern the act would not be applied vigorously enough to effectively mitigate the power of industrial trusts.

14/ April v. National Cranberry Association, 168 F.Supp. 919.921 (D.C. Mass. 1958).

15/ 21 Cong. Rec. 2561, 2562, 2606 (1890).

16/ 21 Cong. Rec. 2726 (1890).

Second, the Sherman Act and similar statutes adopted by the States were used to attack farmer associations as unreasonable restraints of trade. 17/

Thus, the antitrust law farmers had fought for was turning out to be a burden rather than an asset. As a consequence, agricultural organizations sought legislation that would protect them from overzealous enforcement of the Sherman Act.

Congress first recognized producers' needs for limited antitrust protection when it passed the Clayton Act in 1914. Section 6 of the Clayton Act states:

> "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 objectives 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." 18/

While this language was a clear expression by Congress that forming a cooperative was not a violation of the antitrust laws, it did not indicate the types of activities such an association could lawfully engage in. Also, its benefit was limited by the fact that it only applied to nonstock organizations.

CAPPER-VOLSTEAD ACT

Agricultural leaders recognized the shortcomings of the cooperative provision in the Clayton Act and, after several years of

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17/ Loewe v. Lawler, 208 U.S. 274,301 (1908); Ford v. Chicago Milk Shippers' Ass'n, 39 N.E. 651 (Ill. 1895); Reeves v. Decorah Farmers' Co-operative Society, 140 N.W. 844 (Ia. 1913).

18/ 15 U.S.C. 17.

intense congressional education, secured enactment of the Capper-Volstead Act in 1922. 19/

Sometimes referred to as the Magna Charta of cooperative marketing, Capper-Volstead has enabled producers to develop a broad range of agricultural businesses that enhance their profit opportunities as farmers.

And just as important, farmers who market products through a cooperative that is not organized and operated as required by Capper-Volstead are in probable violation of the antitrust laws.

Capper-Volstead has two provisions. Section 1 sets out who is covered by the act, activities protected from antitrust liability, and requirements on organizational structure to receive its protection.

Section 2 protects the public from harmful conduct by cooperatives. It empowers the Secretary of Agriculture to prevent cooperatives operating within the scope of Capper-Volstead from using their market power to unduly enhance the price of products they market.

Section 2 does not give the Secretary of Agriculture jurisdiction over charges of antitrust law violations outside the scope of Capper-Volstead. 20/ The Department of Justice, the Federal Trade Commission, and private parties may all sue cooperatives over anticompetitive conduct not protected by Capper-Volstead. 21/

The following discussion of section 1 explains how a cooperative must function to shield itself from antitrust liability.

Who Is Covered

The protection of the Capper-Volstead Act is available only to cooperatives that limit membership to agricultural producers and associations of producers. An agricultural producer is someone per-

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19/ 7 U.S.C. 291.292. **An outline of the Capper-Volstead Act is provided in appendix A.**

20/ United States v. Borden Co., 308 U.S. 188 (1939); Maryland & Virginia Milk Producers Ass'n v. United States. 362 U.S. 458 (1960).

21/ Fishermen receive the same protection as farmers under the Fishermen's Collective Marketing Act, 15 U.S.C. 521-522. For additional information on this statute, see Donald Frederick, "Fisheries Marketing Cooperatives: An Antitrust Perspective," 9 Journal of Agricultural Taxation & Law 47 (Spring 1987).

forming traditional farming activities such as tilling the soil and tending to animals. Cooperative leaders should react with caution whenever they receive a membership application from someone who does not clearly conform to this standard.

One common area of difficulty for cooperatives seeking to identify producers is the landlord-tenant relationship. The tenant farmer is clearly a producer. A landlord whose rent is a portion of the crop or proceeds of the sale is also a producer. However, a landlord who receives a flat rental fee for the land is not a producer. In the latter case, the landlord is not participating in production, so the landlord is considered an investor rather than a farmer.

A situation that requires special consideration is the application for membership from an entity engaged in packing or processing agricultural commodities. If a noncooperative firm engaged solely in packing or processing is accepted as a member, the exemption is lost. 22/ Such applicants must be rejected.

However, if an applicant devotes a substantial portion of its resources to agricultural production, and also has a packing or processing operation, the applicant is considered a producer and may belong to a marketing cooperative. 23/

A more difficult question is the status of a noncooperative processor with only a modest investment in agricultural production. The courts have said other producers do not forfeit Capper-Volstead protection if their cooperative accepts a large corporate grower as a member, provided that grower's role is limited to the extent of its own production that it markets through the association. 24/

22/ Case-Swayne Co. v. Sunkist Crowers, Inc., 389 U.S. 384 (1967); United States v. National Broiler Marketing Association, 436 U.S. 816 (1978)

23/ Case-Swayne v. Sunkist. 389 U.S. 384. The court mentioned grower-processors held membership in Sunkist but only required the purging of nonproducer processors.

In a letter to counsel for the Texas Produce Marketing Cooperative, dated March 17.1988, the Department of Justice advised the cooperative could have members who provide packing and marketing services for themselves and other members.

24/ Northern California Supermarkets v. Central California Lettuce Producers Cooperative, 413 F.Supp. 984 (N.D.Cal. 1976). aff'd, 580 F.2d 369 (9th Cir. 1978). cert. denied, 439 U.S. 1090 (1979). Presence of United Brands as a member did not weaken claim to Capper-Volstead protection.

This rule is not likely to change unless the Capper-Volstead Act is amended. As one court noted:

"There are those who contend that the economics of farming have changed so dramatically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power (cites omitted). It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute." 25/

Nonetheless, involvement of such a firm in a cooperative is a "red flag" that may attract scrutiny from antitrust officials.

Another issue that must be dealt with is the need to keep cooperative membership rolls current. The requirement to be an association of producers places a duty on leaders to regularly review the membership roll and revoke the memberships of persons who are no longer producers. Many cooperatives have a bylaw providing for automatic termination of a member who is no longer a producer or stops marketing products through the cooperative.

A membership is revoked when the member's right to vote is rescinded. A prudent cooperative will have both a bylaw rescinding inactive and ineligible memberships and a policy of making sure the bylaw is enforced so only current producer-patrons retain the right to vote at membership meetings.

While this is not a day-to-day requirement, 26/ a cooperative's status as an association of producers will be in jeopardy if it does not have a program to keep the membership roll current.

Organizational Requirements

The plain language of the statute imposes well defined constraints on producer associations that wish to qualify for its protection. If an association determines it cannot function within these

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25/ Fairdale Farms v. Yankee Milk, 635 F.2d 1037, 1045 n.7. (2d Cir. 1980). cert. denied 454 U.S. 818 (1981).

26/ Alexander v. National Farmers Organization, 687 F.2d 1173, 1186 (8th Cir. 1982), cert. denied 461 U.S. 937 (1983). The court was tolerant of a few shortterm nonproducer members who were not processors or other middlemen using the exemption to shield otherwise illegal conduct.

constraints, then the association should approach antitrust risk management as if the exemption does not apply.

One-member, one-vote or limited return on capital. Either the association must not allow a member more than one vote because of the amount of stock or membership capital owned in the association, or it may not pay dividends on stock or membership capital in excess of 8 percent per year. Many associations do both.

Member business ***must exceed nonmember business.*** Capper-Volstead permits great flexibility in marketing products of nonmembers. However, a protected association may not deal in the products of nonmembers in an amount greater in value than such products are handled by it for members. This means produced by members. Goods purchased from other sources by members and marketed through the cooperative must be counted as nonmember products because they were not produced by the member.

Mutual Benefit of Members as Producers. a s s o c i a t i o n must promote the mutual **benefit of** the members as agricultural producers. This prevents abuse of the legislation. For example, major road builders in an area **cannot** put a broccoli patch behind their garages and then form a vegetable marketing cooperative to serve as a shield for colluding on construction contract bids, nor can a group of food processors with limited agricultural production use a cooperative to agree on prices for their entire manufacturing output.

Protected Activity

The heart of the Capper-Volstead Act is language stating that agricultural producers may act together in collectively "processing, preparing for market, handling, and marketing" their products.

The key term is marketing, which has been interpreted to include virtually all services a marketing cooperative could reasonably be expected to provide its members. As one court stated:

"We think the term ***marketing*** is far broader than the word sell. A common definition of 'marketing' is this: 'The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and ***supplying market information.'*** (cite omitted) . . . We see no reason to give that

word a special meaning within the context of the Capper-Volstead Act." (court's emphasis) 27/

The courts have said marketing can involve a minimum of collective activity, such as establishing a floor price below which no member will sell product. 28/ Or cooperatives can integrate forward throughout the marketing chain. The members of Land O'Lakes, Ocean Spray, Sun Diamond, Blue Diamond, and Welch's are examples of producers that put their product right on the grocery store shelf.

Cooperative associations are authorized to have common marketing agencies and to make the necessary contracts and agreements to carry out permitted marketing and related activities.

Farmers who are members of one cooperative can agree on marketing practices with farmer members of another cooperative by having their associations use a common marketing agent 29/, form a federation 30/, or simply work together to accomplish their legitimate marketing objectives. 31/

AREAS OF ANTITRUST RISK

The Capper-Volstead Act does more than merely extend section 6 of the Clayton Act to cooperatives with stock. The act authorizes a range of collective activity. The main benefit of qualifying for protection under Capper-Volstead is that producers can pursue opportunities in these areas with little risk of adverse antitrust consequences.

While Capper-Volstead offers farmers an opportunity to enhance their marketing power, it is not a total exemption from antitrust law. Cooperative leaders must deal on a regular basis with situations that pose antitrust problems. These are the areas of conduct that risk management requires be carefully reviewed, and

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27/ Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, 497 F.2d 203,215 (9th Cir. 1974). cert. denied 419 U.S. 999 (1974).

28/ Northern California Supermarkets, 413 F.Supp.984.

29/ United States v. Maryland Cooperative Milk Producers, Inc., 145 F.Supp. 151 (D.C.D.C. 1956).

30/ Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).

31/ Treasure Valley, 497 F.2d 203.

sometimes avoided.

As these situations are discussed, a common theme will be repeated. Conduct that is frequently permissible if engaged in exclusively by agricultural producers becomes illegal if both producers and nonproducers are involved. Thus the first element of a risk management policy should be to carefully review any proposed anticompetitive conduct with nonproducers before it begins.

This does not prevent cooperatives from making agreements with noncooperative firms. Such a prohibition would make it impossible for them to do business, and that fact is recognized in Capper-Volstead by language specifically authorizing contracts and agreements for normal business purposes.

Agreements with noncooperative firms are judged as if they were between two noncooperative firms. If challenged, the usual tests for measuring compliance with the Sherman, Clayton, and Federal Trade Commission Acts will be applied.

Agreements on Price and Terms of Sale

Price agreements are considered the most objectionable violation of the antitrust laws. The primary benefit to agricultural producers of forming a marketing association that qualifies for Capper-Volstead protection is that producers who are members of such an association can agree among themselves on the prices they will accept for the agricultural products they produce and all reasonable terms of sale. 32/

This protection for price agreements does not extend to agreements with noncooperative competitors. In the first decision interpreting Capper-Volstead, the U.S. Supreme Court ruled that a price agreement between a marketing cooperative and noncooperative businesses, unions, and government officials violated the Sherman Act. 33/

Counsel to cooperatives have sometimes advised their clients to leave a meeting, particularly a commodity group meeting, "if they start to talk prices."

32/ GVC Cannery v. California Tomato Growers Ass'n, 511 F.Supp. 711 (N.D. Cal. 1981); Washington Crab, 66 F.T.C. 45 (1964).

33/ United States v. Borden, 308 U.S. 188 (1939).

Whether this is necessary depends on who is in the room and the nature of the conversation. If everyone in attendance represents a cooperative with Capper-Volstead protection, then prices can be freely discussed.

Cooperative representatives can also agree on prices with a single buyer. This is a reasonable restraint of trade essential to normal commercial operations.

However, if a noncooperative competitor or more than one noncooperative buyer is present, caution is essential. While some exchange of general information may be permissible, anything that indicates the meeting may be a pretext for a tacit agreement can cause problems. The issue of risk management is deciding at what point one wants to leave the room.

Undue Price Enhancement

Section 2 of the Capper-Volstead Act protects the public from abuse by a marketing cooperative. It directs the Secretary of Agriculture to order a cooperative to cease monopolizing or restraining trade if the monopolization or restraint of trade results in unduly enhanced prices.

Regulations spelling out the procedures to be followed in conducting an investigation under section 2 of Capper-Volstead are published at 7 CFR 1.160. The regulations follow generally accepted administrative law principles. If an order by the Secretary of Agriculture to cease anticompetitive conduct is ignored, the Department of Justice is responsible for enforcing that order.

Substantial Market Share

Farmers may, through a single cooperative "or in combination with other exempt cooperatives, obtain monopoly power in a given market so long as it is achieved through natural growth, voluntary confederation and without resort to predatory or anticompetitive practices." 34/

This means farmer cooperatives are free from the prohibition on monopolization in section 2 of the Sherman Act, as long as they

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34/ Alexander v. NFO, 687 F.2d at 1182.

achieve their market share through legitimate business practices.

Again, any agreement with noncooperative firms to monopolize any part of trade or commerce is outside the scope of Capper-Volstead protection and subjects the parties involved to liability under the conspiracy to monopolize language of the Sherman Act. 35/

Mergers and Acquisitions

Mergers and acquisitions may result in violations of the antitrust laws. Section 7 of the Clayton Act forbids any corporate combination or acquisition that may substantially lessen competition or tend to create a monopoly. 36/

While this provision does not specifically exempt mergers among cooperatives, no serious legal challenge has been mounted to a combination of cooperatives. It would make no sense for a court to order producers to dissolve their cooperatives and rejoin a new association when they could voluntarily have elected to pursue that option and voted instead to combine directly. 37/

But cooperatives are subject to the same rules as noncooperative firms when they merge with or acquire a noncooperative business. 38/ The court will look at the economic effect of the purchase. If it stifles competition, the purchase is likely to be found to violate antitrust law, usually section 7 of the Clayton Act. 39/

Not all purchases of noncooperative competitors are prohibited. A merger or acquisition may involve relatively small firms and thus not substantially lessen competition. A purchase may even

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35/ Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

36/ 15 U.S.C. 18.

37/ The Supreme Court has said it will not "impose grave legal consequences upon organizational distinctions that are of de minimus 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." Sunkist Growers v. Winckler & Smith Citrus Products, 370 U.S. at 29 (1961).

38/ U.S. v. Rice Growers Ass'n of California, 1986-2 Trade Cases, par. 67,287, footnote 5 (E.D. Cal., January 31. 1986).

39/ Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

enhance competition. For example, the resulting firm may be better able to compete with stronger competitors than the individual firms did before the consolidation. Also, if a noncooperative business is likely to fail, and a cooperative has done nothing illegal to cause the failure, the cooperative may be free to proceed.

A cooperative contemplating a merger or acquisition should be cognizant of the premerger notification rules. As a business combination can be virtually impossible to reverse, the Clayton Act was amended in 1976 to require firms planning a merger or acquisition, under specified circumstances, to provide premerger notification to the Department of Justice and the Federal Trade Commission and to wait a prescribed period before the combination is finalized. 40/

The courts will not tolerate structuring a deal to avoid premerger notification. 41/

Customer Selection

As a general rule, any business, including a cooperative, that does not have monopoly power is free to select its customers. Most antitrust problems pertaining to customer selection evolve from efforts to impose unreasonable restraints on customers.

For example, a cooperative and a buyer are free to voluntarily agree that the cooperative will provide all of a product the buyer needs. 42/ However, if the cooperative coerces the buyer into signing such an agreement, the courts are likely to find an illegal attempt to monopolize. 43/

Customer selection on the basis of the customer's willingness to resell product at prices dictated by the cooperative must also be carefully evaluated. For some time cooperatives have been allowed to refuse to sell to a buyer unless the buyer terminates its discount-

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40/ Hart-Scott-Rodino **Antitrust Improvements Act of 1976, 15 U.S.C. 18a.**

41/ U.S. v. Rice Growers Ass'n of California. 1986-2 Trade Cases, par. 67,288 (E.D. Cal., January 31. 1986).

42/ Isaly Dairy Company v. United Dairy Farmers, 250 F.Supp. 99 (W.D. Pa. 1966).

43/ Alexander v. NFO, 687 F.2d at 1196.

ing policy 44/, but if the cooperative attempts to set the price at which the products are resold, a violation may occur. 45/ The Supreme Court has recently affirmed the application of this rule to business in general. 46/

A decision to refuse to deal with a willing customer should also be made only after careful thought. As a general rule, producers may agree among themselves to sell to one buyer and refuse to deal with a competitor of that buyer. 47/ However, if the refusal to deal is a device to acquire a monopoly, fix prices, or establish market dominance and drive out competitors, it is illegal. 48/

Member Selection

As discussed above, the Capper-Volstead Act require agricultural marketing cooperatives to limit membership to bona fide producers. Many State statutes that authorize the incorporation of agricultural cooperatives place the same restriction on supply and marketing associations organized thereunder. 49/

Cooperatives are free to establish other reasonable conditions on membership, such as purchasing stock, paying membership fees, and signing membership and marketing agreements.

Sometimes a cooperative has limited capacity and cannot serve additional members without limiting services available to existing members. Or cooperative members may feel a particular applicant might disrupt the association or doesn't produce a high-quality product. In these and similar situations, the cooperative can usually reject otherwise qualified applicants.

44/ Superior Dairy v. Stark County Milk Producers Ass'n, 100 N.E.2d 695 (Ct. App., Stark Co., Ohio 1950).

45/ Bergjans Farm Dairy Co. v. Sanitary Milk Products, 241 F.Supp. 476 (E.D. Mo. 1965), affd 368 F.2d 679 (8th Cir. 1966).

46/ Business Electronics Corp. v. Sharp Electronics Corp., 56 USLW 4387 (decided May 2. 1988).

47/ United States v. King, 229 F. 275 (D.C. Mass. 1915).

48/ L.S. Good & Co. v. H. Daroff & Sons, 263 F.Supp. 635 (N.D. W.Va. 1967).

49/ James Baarda, State Incorporation Statutes for Farmer Cooperatives, Agricultural Cooperative Service, USDA, Cooperative Information Report No. 30, section 10.03.05 (1982).

If a rejected applicant can convince a court that cooperative membership is essential to staying in business and competing with members, the court might rule other members would have to make room for the applicant.

Talk of such a suit arose during the energy shortage of the early 1970's, when noncooperative suppliers of petroleum products withdrew from rural areas. Cooperatives, with their established members already on rationing, were reluctant to accept producers abandoned by noncooperative firms. The shortage abated before litigation became a reality.

The U.S. Supreme Court has held that expulsion of a member by a supply cooperative is not a per se violation of antitrust law. It is an unreasonable restraint only if the expulsion was intended to, and did in fact, "result in predominantly anticompetitive effects." 50/ This decision will carry great weight in any future litigation over the right to be a member of any cooperative.

Transportation

Even before enactment of the Sherman Act, the Government had placed regulatory clamps on the railroad trusts. 51/ In 1935, the trucking industry also was placed under Federal regulation. 52/ Antitrust was not an important issue in transportation. The Interstate Commerce Commission set rates and rules of service, so companies in the industries and users of their services were not free to engage in conduct that usually triggers antitrust concerns.

The enactment of Federal legislation providing limited deregulation of the railroad and trucking industries in 1976 and 1980 created enormous new challenges for all shippers, particularly those dependent on rail service. 53/ This included numerous farmer cooperatives.

50/ Northwest Wholesale Stationers v. Pacific Stationery and Printing, 472 U.S. 284 (1985).

51/ Interstate Commerce Act, 24 Stat. 379 (1887).

52/ Motor Carrier Act, 49 Stat. 543 (1935).

53/ Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 (1976); Motor Carrier Act of 1980, 94 Stat. 793 (1980); Staggers Rail Act of 1980, 94 Stat. 1895 (1980).

Storerooms full of tariff books were suddenly of greatly diminished importance. Transportation officers, who had matured under a system that emphasized auditing freight bills to identify overcharges, were thrust into an environment that called for competition and provided for negotiated contract rates. And at the same time, antitrust laws were made applicable to the transportation industry.

Confusion arose, and continues, over the extent that cooperatives are able to work with each other, and with noncooperative firms, to negotiate rates and terms of service with the carriers. Some familiar rules will help guide cooperative leaders to a greater understanding.

The earlier quotation from the Treasure Valley opinion, defining marketing, included "transporting" as one of activities included in "marketing" as the term is used in the Capper-Volstead Act.

Another court held that the term "handling" as used in Capper-Volstead also encompasses hauling. 54/

One case involved marketing of potatoes, the other milk. Thus, case law strongly suggests Capper-Volstead permits producers and producer associations to jointly negotiate for transporation services when moving their products as part of the marketing process.

It is questionable if a court would reach the same conclusion in a case involving the transportation of supplies. However, joint negotiation of transportation service contracts has not been held to be a per se violation of antitrust law, so the rule of reason would apply to agreements between cooperatives when negotiating transportation service contracts covering inputs.

Only cooperatives with a substantial share of the available market, in this instance traffic, are likely to be exposed to much risk.

This may not make sense to cooperatives that market grain and furnish farm supplies. They can talk freely and agree with neighboring cooperatives when arranging to ship grain, but must be cautious when discussing arrangements with the same cooperatives for bringing supplies into the area.

Agreements to coordinate with noncooperative shippers on

54/ Green v. Associated Milk Producers Ass'n, 692 F.2d 1153, 1157 (8th Cir. 1982).

transportation matters are also subject to the rule of reason. They are permitted as long as they do not unreasonably restrain competition.

Limitations on Quantities Handled

Agricultural production in excess of market demand is a continually recurring event that depresses prices and makes it difficult for cooperatives to sell all of their members' production. Many cooperatives nonetheless agree to accept all member production of commodities they handle and to make the best possible effort to market them at the best available price.

Cooperatives are free to limit the amount of product they will accept, even from members. This may be necessary because the cooperative's facilities are only adequate to handle a certain quantity of product or because management feels it can only market so much product.

Any limitations are usually placed in a clause in the member marketing agreement specifying the quantity the cooperative is obligated to accept, or the acreage whose production can be delivered. If the cooperative decides later that it can market additional member production, the cooperative may agree to do so but is not under a prior obligation to do so.

Cooperative officials may also deal with an anticipated oversupply problem by providing information to members that suggests they produce less. Such member education activity was specifically authorized with enactment of the Cooperative Marketing Act in 1926. Section 5 of that act permits producers organized in cooperative marketing associations to "acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information . . . ." 55/

There is a limited body of case law indicating producers may use their cooperative as a vehicle to agree among themselves to limit the quantity of a commodity they will produce. 56/

55/ 7 U.S.C. 451.455.

56/ Washington Crab, 66 F.T.C. at 126-127; Alexander v. NFO, 687 F.2d at 1188.

The conventional belief among cooperative scholars is that this goes beyond the extent of the protection available under the Capper-Volstead Act. 57/ This view is consistent with the position of the antitrust enforcement agencies. 58/

Cooperatives that want to have a prudent risk management policy will not do more in this area than limit the quantity of produce they will accept to what they can profitably market and suggest to members that they limit their own production so supply will not greatly exceed demand in the marketplace.

Predatory Conduct

Any time a cooperative steps outside the bounds of accepted competitive practices and undertakes conduct that is anticompetitive and has no business justification, it is said to be engaging in predatory conduct. The courts have consistently held that predatory conduct clearly violates the antitrust laws and is just as clearly outside the scope of protection provided by Capper-Volstead.

Predatory conduct may be undertaken as part of a conspiracy with other cooperatives and with noncooperative firms. Even a single, properly structured cooperative receives no protection if its actions are predatory and would constitute an attempt to monopolize or a monopolization under the Sherman Act.

Determining if a particular course of conduct is predatory requires subjective analysis, so the courts will examine the facts in each case.

Conduct on the part of cooperatives that the courts have found predatory includes threats of physical violence to force nonmembers to market through the association 59/, attempting to increase market share by giving secret cash rebates to customers in plain brown

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57/ Legal Phases of Farmer Cooperatives, Farmer Cooperative Service, USDA, Information 100, p. 299 (1976).

58/ Sherman R. Hill, "Agricultural Cooperatives and the Federal Trade Commission," American Cooperation 1960. American Institute of Cooperation, at page 452.

59/ Steers v. United States, 192 F. 1, (6th Cir. 1911).

envelopes 60/, using intimidation and force to prevent nonmembers from selling to buyers at prices below those set by the association 61/, and setting up pickets outside of retailers who handle product from noncooperative sources. 62/

While members of a cooperative may refuse to deal with someone, they cannot pressure outsiders to also refuse to deal with that person. Such conduct is referred to as an illegal boycott. 63/

Marketing orders and other Government programs can aid the collective marketing activities of producers. But attempts to manipulate regulatory schemes to create a monopoly have been held to be predatory conduct. Providing misleading information to regulators and persistently filing complaints and appeals to harass competitors and keep them from obtaining operating permits were the court's examples of predatory conduct. 64/

While there is no fullproof test to identify predatory conduct, an intuitional feeling that morally the activity just isn't right can be a pretty effective indicator. Certainly counsel should be consulted before any cooperative undertakes activity that appears to have little economic justification.

SUPPLY COOPERATIVES

Supply cooperatives have, to date, successfully avoided antitrust problems. Thus potentially troublesome issues, such as whether "preparing for market" as the term is used in Capper-Volstead is broad enough to include providing supplies, have remained academic exercises.

60/ Bergjans Farm Dairy v. Sanitary Milk Producers, 241 ESupp. 476 (E.D. Mo. 1965), affd 368 F.2d 679 (8th Cir. 1966).

61/ Gulf Coast Shrimpers and Oyster Ass'n v. United States, 236 F.2d 658 (5th Cir. 1956).

62/ North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966). Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n, 261 ESupp. 381 (W.D. Pa. 1966), affd 388 F.2d 789 (3d Cir. 1967).

63/ Boise Cascade v. Northern Minnesota Pulpwood Producers Ass'n, 294 ESupp. 1015 (D. Minn. 1968).

64/ Marketing Assistance Plan v. AMPI, 338 ESupp. 1019 (S.D. Tex. 1972).

At least three factors are contributing to the successful risk management efforts of supply cooperatives. First, when a supply cooperative sells inputs to its members, the members are selling to themselves. The conspiracy provisions of the antitrust laws do not prohibit agreements on prices and allocations of supplies among members of a cooperative, so long as the agreements do not somehow place unreasonable restraints on the business opportunities of nonmembers. 65/

Second, since the earliest cases interpreting the Sherman Act, the courts have been reluctant to find conduct violates the monopolization provisions of the antitrust law unless there is a "dangerous probability" it will reduce competition. 66/ Supply cooperatives compete with worldwide petroleum, chemical, and agribusiness firms. No individual supply cooperative has, or is likely to soon attain, sufficient market power to control prices or eliminate competitors.

Third, supply cooperative leaders have, thus far, avoided engaging in conduct that leads to antitrust liability. They have not entered into agreements with competitors that have been challenged as illegal per se or unreasonable restraints on trade. They have also refrained from anticompetitive conduct without clear business justification.

OTHER POINTS TO REMEMBER

This section of the report discusses a few other points that are important to remember when assessing antitrust risk.

Personal Liability for Leaders and Advisers

The antitrust law is quite clear that individuals in policy positions are as liable as corporations for violations of the antitrust laws.

65/ S. Chesterfield Oppenheim, et al.. Federal Antitrust Laws, 4th Ed. (St. Paul, MN: West Publishing Co., 1981), P. 217.

66/ Swift & Company v. United States, 196 U.S. 375 (1905). Northwest Wholesale Stationers v. Pacific Stationary and Printing, 472 U.S. 284 (1985).

Sections 1 and 2 of the Sherman Act state that individuals who make any contract, engage in any combination or conspiracy, or monopolize or attempt to monopolize interstate commerce in violation of the act are guilty of a felony and subject to a fine of up to $100,000 and a prison term of up to 3 years. 67/

The scope of this language has been interpreted quite broadly to encompass outside advisers, including legal counsel that actively participate in cooperative policymaking. As one court stated:

"The individuals through whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization.

"We do not believe that this rule can be applied to the counsel for a corporation whose activity is brought into question, if the role of the counsel was only that of a legal adviser. This would be true even if, as counsel, he mistakenly advised corporate officers that a particular course of conduct would not violate section 2. But if he goes beyond that role and, acting by himself or jointly with others, makes policy decisions for the corporation, then he subjects himself to liability for attempted monopolization as in the case of any executive officer of the company performing a similar function." 68/

Many cooperatives rely on attorneys, accountants, bankers, and other outside professionals for business advice. This can be a valuable service to the association. But it does not relieve the directors and managers of their potential personal liability under antitrust law. And it can lead to unexpected exposure for the advisers themselves if they do not understand the potential antitrust implications of the situation under review.

67/ Section 14 of the Clayton Act, 15 U.S.C. 24. also provides that if a corporation violates any penal provision of the antitrust laws, the officers, directors, and agents who authorized the offending acts are guilty of a misdemeanor punishable by up to a $5.000 fine, one year in jail, or both. However, this provision is rarely used as the Justice Department usually attempts to secure a felony conviction in antitrust cases.

68/ Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n. 358 F.2d at 118.

Prlvate Treble-Damage Litigation

While many major antitrust cases are brought by Government agencies, private litigation may pose a greater threat to most cooperatives.

The provision in section 4 of the Clayton Act tripling the damage award is a strong incentive for such suits, especially for a competitor with severe financial problems.

To recover damages in a private action, the plaintiff must prove both a violation of the antitrust laws and that the violation was the proximate cause of the damage suffered. 69/

In one case, a cooperative refused to fulfill a contract to supply product to a new, price-cutting processor, upon the urging of its other customers. This refusal to deal, which resulted from an illegal conspiracy to restrain trade, cost the processor sales and income. The processor was awarded treble damages and costs. 70/

In today's litigious business climate, the likelihood of private suit must be part of any antitrust risk management program.

State Antitrust Laws

Federal antitrust laws do not totally supersede State laws. While Capper-Volstead provides protection from State prosecution for activities it authorizes, a cooperative may violate State law by colluding with noncooperative firms. 71/ Counsel should be asked to check for any State law provisions that may provide a unique risk for cooperatives operating within its borders.

Business Review Letters

Both the Antitrust Division of the Department of Justice and the Federal Trade Commission have procedures for issuing advisory

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69/ Consolidated Dairy Products Company v. Bar-T Ranch Dairy, 642 P.2d 1240 (Wash. 1982).

70/ Forth Texas Producers Ass'n v. Young, 308 F.2d 235 (5th Cir. 1962).

71/ State v. Golden Guernsey Dairy Cooperative, 43 N.W.2d 31 (Wis. 1959).

opinions on whether a proposed course of conduct is likely to trigger antitrust enforcement activity. 72/ As indicated in footnote 23, this can help a cooperative evaluate the extent of the risk in a proposed course of conduct.

Although the Government has honored its advisory commitments not to prosecute, people don't often apply for this clearance. Antitrust issues, unlike tax issues for example, are factually intense. The antitrust enforcement agencies have been careful in their business review letters to limit their response to the facts as they perceive them at the time the request is made. Thus, business review letters generally do not provide as much comfort as a private letter ruling issued by the Internal Revenue Service.

Also, as one commentator put it, "Most firms feel more secure maintaining a 'low profile' and relying upon the advice of private counsel." 73/

CONCLUSION

Agricultural producers must be ready to deal with more than the decreasing number and increasing size of domestic processors. Many agricultural markets are becoming truly worldwide. Foreign competitors are aggressively seeking our domestic and overseas markets. Multinational firms and conglomerates are becoming more dominant in processing and consumer marketing.

While the independent producer can still survive, the task is becoming more difficult all the time. Group action, through cooperatives, offers farmers the economic power to compete in today's market environment.

Attaining and using that power is not without problems of its own, including the threat of antitrust litigation. Cooperative leaders that recognize the threat, and learn how to deal with it--as opposed to either ignoring it or letting it paralyze their management planning--will be one step ahead in providing services their members will need in the years ahead.

72/ Antitrust Division Business Review Procedure, 28 C.F.R. 50.6; FTC Advisory Opinion Procedure, 16 C.F.R. 1.1 et seq.

73/ S. Chesterfield Oppenheim, et al., Federal Antitrust Laws, 4th Ed. (St. Paul, MN: West Publishing Co., 1981) p. 1041.

APPENDIX A -- CAPPER-VOLSTEAD ACT

Section 1. Extent of the exemption

Section 1 of the Capper-Volstead Act defines the "persons" and "associations" entitled to claim the limited antitrust exemption granted, and describes the elements and scope of the exemption. This modified outline breaks out the key concepts in the statutory language.

A. Membership must be limited to "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . .."

B. Agricultural producers may:
(i) "act together in associations, corporate or otherwise, with or without capital stock"
(ii) "in collectively processing, preparing for market, handling, and marketing such products of persons so engaged."

C. Such associations may:
(i) "have marketing agencies in common," and
(ii) "make the necessary contracts and agreements to effect such purposes."

D. Provided:
(i) "such associations are operated for the mutual benefit of the members . . . as . . . producers,"
(ii) "no member . . . is allowed more than one vote because of the amount of stock or membership capital he may own, or the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum."
(iii) "the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

Section 2. Public Interest Protected

Section 2 of the Capper-Volstead Act confers on the Secretary of Agriculture the authority to prevent agricultural producers from abusing their collective marketing power. It provides, in part:

"If the Secretary of Agriculture . . . (following a hearing believes a cooperative) monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue . . . an order ... directing such association to cease and desist from monopolization or restraint of trade."

"The Department of Justice shall enforce any such order."

APPENDIX B - OTHER IMPORTANT STATUTES

Several other Federal statutes are closely related to the antitrust laws. Cooperative leaders should be familiar with the main objectives of these acts so they can identify how these laws may affect cooperative structure and operation.

Cooperative Marketing Act of 1926

In the Cooperative Marketing Act of 1926, Congress authorized farmers, through cooperative associations, to exchange and disseminate market and economic information among themselves. This act also provides legislative authorization for the Agricultural Cooperative Service and its research activities and assistance to cooperatives. 74/

Agricultural Marketing Act of 1929

The stated policy of the Agricultural Marketing Act of 1929 is to promote effective marketing of agricultural commodities by promoting and financing cooperatives. Although much of the substance of this act has been superseded by Farm Credit legislation, it still remains a valid statement of congressional support for agricultural cooperative marketing. 75/

Robinson-Patman Act of 1936

The Robinson-Patman Act prohibits the sale of commodities of the same grade and quality at prices that discriminate between purchasers without economic justification. While the act applies to cooperatives, it specifically provides that payment of patronage refunds will not violate the act. 76/

Agricultural Marketing Agreement Act of 1937

This law authorizes the Secretary of Agriculture to enter into marketing agreements with producers of certain agricultural prod-

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7417 U.S.C. 45 l-457.
75112 U.S.C. 1141.
76/ 15 U.S.C. 13, 13b.

ucts and provides that nothing in those agreements shall be held to violate the antitrust laws. It also authorizes the Secretary to establish Federal marketing orders, which are plans developed by growers (often represented by cooperatives) and handlers to work out supply and demand programs. Marketing orders are also exempt from the antitrust laws. 77/

Agricultural Fair *Practices* Act of 1967

The Agricultural Fair Practices Act protects farmers' rights to organize and join producer associations. The act establishes standards of fair practice for handlers and processors who deal with farmers, and prohibits them from discriminating against farmers because they are members of a producers' association. 78/

Export Trading Company Act of 1982

The Export Trading Company Act provides antitrust protection for legitimate foreign market development activity. The act provides cooperatives interested in export marketing flexibility to combine assets with other businesses, including noncooperative processors and merchandisers, to become big enough to be a factor in the international arena. 79/

7717 U.S.C. 601 et seq.

78/ 7 U.S.C. 2301-2306.

79/ 15 U.S.C. 6a, 45(a)(3). See Janice Payt, "How Agricultural Exporters. Cooperatives, and Joint Export Marketing Groups Can Use the Export Trading Company Act," 8 Journal of Agricultural Taxation and Law, p. 34 (Spring 1986).

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Agricultural Cooperative Service (ACS) provides research, management, and educational assistance to cooperatives to strengthen the economic position of farmers and other rural residents. It works directly with cooperative leaders and Federal and State agencies to improve organization, leadership, and operation of cooperatives and to give guidance to further development.

The agency (1) helps farmers and other rural residents develop cooperatives to obtain supplies and services at lower cost and to get better prices for products they sell; (2) advises rural residents on developing existing resources through cooperative action to enhance rural living; (3) helps cooperatives improve services and operating efficiency; (4) informs members, directors, employees, and the public on how cooperatives work and benefit their members and their communities; and (5) encourages international cooperative programs.

ACS publishes research and educational materials and issues *Farmer Cooperatives* magazine. All programs and activities are conducted on a nondiscriminatory basis, without regard to race, creed, color, sex, age, marital status, handicap, or national origin.