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Antitrust and Agricultural Cooperatives Collective Bargaining in the Sale of Agricultural Products

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ANTITRUST AND AGRICULTURAL COOPERATIVES COLLECTIVE BARGAINING IN THE SALE OF AGRICULTURAL PRODUCTS

BY L. GENE LEMON*

One of the hottest topics in agricultural circles today is collective bargaining in the sale of agricultural products. Not only are farmers talking—and doing something[1]—about it, but the politicians are talking about it;[2] both the Senate[3] and the House of Representatives[4] of the United States have held hearings on it within the last year; newspapers headline it,[5] and the President, in his State of the Union message of 1968, vowed to encourage it.[6]

What is collective bargaining? Basically, it is little more than an idea at the present time. Many people in agriculture are now realizing that the Great Depression legislation for labor has served industrial workers better than the Great Depression legislation for agriculture has served farmers and ranchers.[7] Agriculture wants to choose again.

This article will outline some rather practical considerations relevant to the subject for practitioners, cooperative leaders and regarding organization, negotiations, and other operations within

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1. LIFE, Mar. 31, 1967, at 4.
2. TIME, Nov. 3, 1967, at 18.
3. *Hearings on S.* 109 *Before the Subcomm. on Agricultural Research and Gen. Legislation of the Senate Comm. on Agriculture and Forestry,* 90th Cong., 1st Sess. (1967).
4. *Hearings on S.* 109 *Before the House Comm. on Agriculture,* 90th Cong., 1st Sess. (1967).
5. Wall Street Journal, Nov. 13, 1967, at 24, col. 1.
6. 114 CONG. REC. H98, H101 (daily ed. Jan. 17, 1968).
7. *Compare* Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1964) *and* Nat'l. Labor Relations Act of 1935 (Wagner Act), 49 Stat. 449 (1935), 29 U.S.C. §§ 151-158, 159-166 (1964), *with* Agricultural Adjustment Act, 48 Stat. 31 (1933), *and* Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937), 7 U.S.C. § 601 *et. seq.* (1964). Through the creation of a federal board, certification elections, and enforced negotiations labor obtained a strong bargaining position. Agriculture, however, received acreage allotments and price supports on a voluntary basis, and federal price fixing and production controls through marketing orders which did not greatly improve the farmers' bargaining position.

present legal bounds. Also, voids in this area of the law as well as the possibilities for using labor precedents in agriculture's collective bargaining activities will be considered. Very little consideration will be given to state cooperative acts, federal income tax law, securities law, and other applicable statutes outside of the trade regulation field.

I. FEDERAL GRANTS OF AUTHORITY

The first federal statute in the trade regulation field was, of course, the Sherman Act,[8] enacted in 1890. While it probably was not intended to outlaw farmers' cooperatives, there was some feeling at the time that its terms—making it a crime to contract or combine in restraint of trade, or attempt to monopolize any part of commerce—would prohibit associations of farmers.[9] While the 'rule of reason' might have eventually allayed those fears, a specific statutory provision was obtained at the first opportuinty to assure farmers that joining a cooperative was not equivalent to entering a combination in restraint of trade.[10]

While exemption was gained for non-stock cooperatives, stock cooperatives remained in doubt as to their standing under the antitrust laws. Non-stock cooperatives, however, were not enamoured with the Clayton Act language which granted them protection only while "lawfully carrying out the legitimate objects thereof." At least one court has written an opinion containing unfavorable dicta.[11] Then, too, there probably was a concern by others that some limit should be placed upon the ability of cooperatives to increase the price of food.[12]

In answer to all these concerns, Congress enacted the Capper-Volstead Act in 1922.[13] In its opening lines, allowing persons who,

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8. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1964).

9. *See, e.g.*, 21 CONG. REC. 2726 (1890).

10. Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1964). The exemption provision of the act states: "[T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects therof; 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." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

11. United States v. King, 229 F. 275 (D. Mass. 1915). The court stated that, although section 6 confers upon a cooperative the right to associate and enter the market as a unit, section 6 does not give a cooperative any rights greater than that of an ordinary business corporation. The court's opinion has not been entirely rejected today and threads of this argument may be found in Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

12. Even in the "good old days" before modern antitrust rules developed, raising the price of food was a rather unpopular thing to do. Thus, the act of the English Parliament during the reign of Edward VI prohibiting forestalling, engrossing and regrating (Statutes at Large, 7 Edw. VI vol. 5, ch. 14) became part of this country's common law. *See* State v. Eastern Coal Co., 29 R.I. 254, 70 Atl. 1 (1908).

13. 42 Stat. 388 (1922), 7 U.S.C. §§ 291, 292 (1964). The text of the Capper-Volstead

"as farmers, planters, ranchmen, dairymen, nut or fruit growers,"[14] produce agricultural products to form cooperative businesses, the Capper-Volstead legislation encourages litigation. Since vegetable growers are not mentioned and since nut and fruit growers are, should there be any concern over the omission? There is no reason to believe that any agricultural commodities were intended to be omitted, and certainly some vegetable growers sell their products cooperatively.

Act is as follows:

SEC. 1. That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

SEC. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Capper-Volstead covers all forms of cooperatives—"corporate or otherwise, with or without capital stock."[15] Since Clayton, applying only to non-stock cooperatives, contains the "legitimate objects" test and Capper-Volstead does not, may one assume that stock cooperatives need not confine themselves to legitimate objects? Such an argument cannot be sustained.[16]

The Act allows growers to associate "in collectively processing, preparing for market, handling, and marketing" agricultural products.[17] Whether the enumeration of these four activities is intended to deny antitrust exemption to cooperative acts not named is a concern. Antitrust exemption may not be available to purchasing (farm supply) cooperatives.[18] For purposes of this article, however, the four enumerated activities are not of serious concern because collective bargaining is a form of marketing and is therefore included in the statute.[19]

Associations are given the right to have marketing agencies in common and to make contracts and agreements to effect their purposes.[20] This provision is amplified by the Cooperative Marketing Act of 1926,[21] which provides authority for federations of cooperative marketing associations and for the acquisition and exchange of past, present and prospective market information by and among farmers or their cooperatives.[22]

Two other federal acts deserve brief mention. The Agricultural Marketing Agreement Act of 1937 allows marketing agreements and marketing orders authorized by the Secretary of Agriculture which, for antitrust purposes, will justify activities of cooperatives acting under such agreements or orders.[23] The Robinson-Patman Act, in section 4, provides that a cooperative may return to its members or patrons refunds or dividends from earnings without violating its pricing provisions.[24]

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14. *Id.* § 1.
15. *Id.*
16. The United States Supreme Court has said, " . . . [T]he full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof' . . . . [T]he Capper-Volstead Act of 1922 extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives which had previously been covered by that section. Section 1 of the Capper-Volstead Act also provided that among the 'legitimate objects' of farmer organizations were . . . ." Milk Producers Ass'n v. United States, 362 U.S. 458, 465-66 (1960). The Court seems today to read both laws together.
17. Capper-Volstead, *supra* note 13, at § 1.
18. L.S. HULBERT & R.J. MISCHLER, LEGAL PHASES OF FARMER COOPERATIVES 169 (Farmer Cooperative Service Bull. No. 10 1968) [hereinafter cited as Hulbert].
19. Most of the milk producers cooperatives have engaged in bargaining, in one way or another, for many years, at least with respect to class I milk. Several have been involved in litigtion and have relied upon Capper-Volstead as a defense. See the various
21. 44 Stat. 802 (1926), 7 U.S.C. §§ 451-57 (1964).
22. 7 U.S.C. § 455 (1964). In the past year the Federal Trade Commission has advised that agricultural cooperatives may establish a common sales agency and cause it to market their members' products. (Advisory Opinion Digest 124, May 5, 1967).
23. 7 U.S.C. § 608(b); *see* 7 U.S.C. § 608(c) (1964).
24. 49 Stat. 1528 (1936), 15 U.S.C. § 13(b) (1964).

II. ORGANIZING FOR EXEMPTION

A. *Statutory Requirements*

If a farmer's bargaining association plans to win its antitrust litigation in the future, it must be prepared to affirmatively plead and prove that it has met the organizational prerequisites to the Capper-Volstead Act's benefits.[25] The organizational tests are as follows:

(1) An association of agricultural producers,

(2) operated, in itself, on a non-profit basis

(3) for the mutual benefit of its members as producers,

(4) not dealing in a greater dollar volume of nonmembers' products than the value of products handled by it for members, and either

(5) conducted on a one-member, one-vote basis or

(6) not paying dividends on capital in excess of eight percent per year.[26]

The following comments, regarding the various organizational tests, are placed in numbered paragraphs in order to correspond with the item numbers above. 1. Generally speaking, only associations whose voting stock is held solely by producers, in the case of organizations with capital stock, or whose memberships are held solely by producers, in the case of non-stock cooperatives, can come within the antitrust exemption.[27] Nevertheless, it seems clear that an association whose members are all Capper-Volstead cooperatives, and hence not producers, is entitled to equivalent benefits.[28] Fundamentally, an association may admit as members or voting stockholders any producers or agricultural organizations which are themselves controlled by producers, the reason for the requirement being to limit market share to that which is possessed by producers themselves.[29] Private elevators, trucking companies, market agencies or other non-producers are, of course, ineligible. Only persons who take the risks and responsibilities of the owner of growing crops or livestock are producers;[30] salaried farm managers, cash-rent lessors and hired "hands" are not producers.

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25. *Compare* Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod's Co., 370 U.S. 19 (1962), *with* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967). In the former case, it was stipulated that Sunkist was a Capper-Volstead Cooperative; in the latter, Sunkist had to plead and prove, and it was not successful.
26. Clayton Act, *supra* note 10; Capper-Volstead Act, *supra* note 13, at § 1.
27. Hulbert, *supra* note 18, at 171.
28. *See* Case-Swayne Co. v. Sunkist Growers, Inc., *supra* note 25.
29. *Id.*
30. *Cf.* Rev. Rul. 67-422, 1967-68 INT. REV. BULL. at 12.

2. The non-profit idea is more or less a hoary chestnut of cooperative law and is intended, with the third requirement, to encourage distributions on a patronage basis rather than on a capital contributions or equal shares basis. Certainly, it is not intended to preclude business-like operations, private benefit, etc.

3. Operations for the mutual benefit of members as producers require, again, distributions on a patronage basis. Also, it seems, the requirement carries with it the idea of absolute farmer control, sufficient at least that the actions of the association serve producers rather than another economic interest. The "mutual benefit" clause of Capper-Volstead may be the twin brother to Clayton's "legitimate objects" standard. Certain price-fixing and exclusive dealing agreements and operations may be upheld under this provision.[31]

4. The member vis-a-vis nonmember business requirement is difficult. All commodities not actually produced by members, but which are marketed by an association, come under nonmember business.[32] This is the case even when a member delivers commodities not produced by him to the association for marketing. Very close bookkeeping is required.

Interestingly enough, there is basis for the proposition that nonmember business cannot be conducted in any products not produced by members.[33] The bargaining cooperatives which merely meet with buyers and negotiate master contracts and then authorize their members to sign the approved contracts for whatever quantities they desire may have great difficulty proving the amount of products "handled" for members, let alone the extent of their nonmember business.

5. Little needs to be said of the one-member, one-vote requirement. Suffice it to say that it is optional, for the requirement discussed in the next paragraph may be met in lieu thereof. Where large corporate farms exist beside very small farms, this requirement is difficult from a practical point of view. Whether this requirement is met or not, all votes must be, directly or indirectly, producer votes; no other economic interest is allowable.[34]

6. Since dividend distributions may not exceed eight percent and may be limited to a lesser percentage, a bylaw authorizing patronage distributions may be desirable. The eight percent requirement relates to capital contributions, and it is placed high enough to

31. *See* Florida Citrus Mutual, 53 F.T.C. 973, 1010 (1957). *See also,* note 84 *infra.*
32. Hulbert, *supra* note 18, at 171.
33. *Id.*
34. *Id.*

attract nonproducer capital, which may be accepted if there are not too many strings attached.[35]

It is interesting to note that, with all the requirements, none relates to organizational form. As a result bargaining groups have formed as unincorporated associations, farmers cooperatives (both stock and nonstock), not-for-profit corporations, and regular business corporations. This seems basically to be a state law question of no significance to federal antitrust law.[36]

B. *Form*

This is the era of the conglomerate corporation, sophisticated management and business techniques, long-range planning, advance contracting and advertising. The bargaining strength of food processors and packers has grown tremendously, nearly drowning that of the individual farmer or rancher. Successful national multi-commodity producers' bargaining associations are a necessity to prevent growers from becoming either serfs to big business or pawns to government.

Cooperatives such as Sunkist, Ocean Spray (cranberries), and Welch (grapes) cannot be built today for many other commodities—the capital requirements are too great and the production areas too widely scattered.

Some of the keys to the development, then, of farmers' economic power lie in the amount of latitude permitted in organizing bargaining units. The Clayton Act and Capper-Volstead Act imply the privilege of building a monopoly and at least one court has stated that a cooperative may acquire a 100 percent position in a market.[37] There is legal authority permitting the inclusion of more than one agricultural product in a marketing association.[38] However, there is no room for coercion in attempting to increase association membership.[39]

With these opportunities and limits established, the question is: How can a bargaining unit gain control of sufficient agricultural production to have a price influence? Success will directly related to the volume subject to bargaining.[40]

There are two possible forms:[41]

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35. Case-Swayne Co. v. Sunkist Growers, Inc., *supra* note 25.
36. *See* 36 OP. ATT'Y. GEN. 326, 339-40 (1930).
37. *See* Cape Cod Food Products, Inc. v. Nat'l Cranberry Ass'n 119 F.Supp. 900, 907 (D. Mass. 1954).
38. Initial decision in Florida Citrus Mutual, 53 F.T.C. 973 (1957), *modified on other grounds*, 53 F.T.C. 999 (1957).
39. United States v. Nat'l Farmers Organization, *settled*, BNA ATTR No. 334, p. A-7 (S.D. Iowa Dec. 4, 1967).
40. Most of the bargaining associations have found that without having 60 to 70 percent of the product market, the price pattern will be established in the open market before buyers attempt to acquire products from the association.
41. *See* United States v. Maryland Cooperative Milk Producers, Inc., 145 F.Supp. 151, 154 (D.D.C. 1956).

(1) A giant direct membership association may be formed,[42] or
(2) local bargaining groups may, through contracts and membership arrangements, form a large federation.[43]

The primary problems with the giant association are related to the traditional independence of farmers and ranchers. Producers and growers firmly believe in local control of their affairs and are reluctant to part with authority to make marketing decisions, especially if the authority leaves for some distant headquarters.[44]

The federation approach is not, however, without its problems. Since in the typical milk bargaining cooperative, which acts only as agent in negotiations with buyers, title passes directly from the dairyman to the buyer, a federation of bargaining cooperatives might be viewed as merely a trade association having no antitrust privileges, an unwarranted result.[45] Authority which firmly establishes the legality of combinations between cooperatives, including the use of common agents is growing.[46]

III. COOPERATIVE OPERATIONS—PROHIBITIONS

Outside of agriculture, there are plenty of cases on price fixing, exclusive dealing, mergers, attempts to monopolize, etc., to guide, with some certainty, practitioners and businessmen. The same cannot be said for agricultural bargaining associations.

For many years, it was widely thought that the Clayton and Capper-Volstead Acts entirely exempted cooperatives from the antitrust laws. Those who so believed were not well served by Judge McColloch, who wrote:

> I am asked to hold that under certain circumstances . . . a farmer's cooperative can be punished as a monopoly. . . . [I]n short, I am asked to scuttle the plain language of the Clayton Act as to cooperatives, as anti-labor courts scuttled the labor provisions of the same act . . . .
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> It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the

42. Cape Cod Food Products, Inc., v. Nat'l Cranberry Ass'n, *supra* note 37.
43. Cooperative Marketing Act of 1926, *supra* note 21.
44. It may also be true that a direct membership national association is required to perform acts which get news headlines rather than acts which improve marketing because of the need to attract farmer interest and membership. If this is the case, the acts perofrmed may lead to legal problems discussed *infra*.
45. An F.T.C. hearing examiner thought a Florida citrus cooperative functioned as a trade association. Initial decision, Florida Citrus Mutual, 53 F.T.C. 973, 985 (1957). However, the Commission disregarded the suggestion and held that the cooperative could negotiate prices even though the fruit growers actually made direct sales. *Id.* at 999.
46. *E.g.*, United States v. Maryland Cooperative Milk Producers, Inc., 145 F.Supp. 151 (D.D.C. 1956); F.T.C. Advisory Opinion (The Advisory Opinion Digest 124, May 5, 1967). In this case the complaint alleged a conspiracy to fix prices effected by employees who served both defendant cooperatives simultaneously. (Transcript of Record, at 10). The case was dismissed without comment on this issue, giving some basis for an opinion that a common agent under the Capper-Volstead Act may be a common employee.

> Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions.[47]

The above quotation is not the law and likely was not the law when it was written. Furthermore, any reliance upon it is sheer folly because cooperatives simply are not exempt from antitrust laws. Farmers' associations do have, however, certain privileges under trade laws which other business firms do not possess. This section explores the limits of these privileges.

A. *Price Fixing*

The very *raison d'etre* of agricultural marketing associations is price fixing. If this action is viewed as one in which private enterprises (farms) have combined to restrain trade, it would be illegal but for the Clayton and Capper-Volstead Acts. But this action should be viewed as one where a single business entity determines the price at which it will sell its products.[48]

If, however, a cooperative combines or conspires with "other persons," it is only a matter of time before a complaint is filed.[49] The *Borden* case does not, in this day, require extended discussion. Suffice it to say that the Pure Milk Association, a dairymen's bargaining cooperative, had joined with officials of the City of Chicago, distributors, handlers, labor unions, arbitrators, and others to fix the price of milk and to regulate its supply in the Chicago market. The consent decree under which Pure Milk Association operates as a result of the *Borden* case prevents the cooperative from (1) requiring distributors who purchase from nonmembers to use terms of purchase specified by the cooperative or agreed upon by the cooperative and distributors, (2) fixing prices to be paid to independent producers, and (3) engaging in resale price maintenance practices.[50]

When associations are engaged in price-making activities, it is advisable for them to meet with prospective purchasers one at a time, refraining from attempting to negotiate through trade as-

47. United States v. Dairy Co-op Ass'n, 49 F.Supp. 475 (D. Ore. 1943). The case related to the alleged acquisition of membership by coercion, a practice which does not always meet judicial approval. *See* United States v. Nat'l Farmers Organization, *supra* note 39.

48. Hulbert, *supra* note 18, at 172.

49. United States v. Borden Co., 308 U.S. 188 (1939). The Court stated: "The right of these agricultural producers . . . to unite . . . cannot be deemed to authorize any combination or conspiracy with *other persons* in restraint of trade . . . ." 308 U.S. 188, 204-05 (emphasis added).

50. Consent decree, United States v. Borden Co., 9 U.S.L.W. 2201, 2202 (N.D. Ill. 1940).

sociations,[51] and to form purchase agreements which go no further than is necessary to market the products which the association has to offer.

The Justice Department for a time apparently viewed price fixing agreements between cooperatives as illegal. In the mid-1950's, it sought to extend the "other persons" rule of the *Borden* case to combinations of bargaining associations.[52] Judge Holtzoff, in a well-considered opinion, decided the test case in favor of the cooperative by reasoning, first, that the legality of the actions of a group of farmers should not depend on the question of whether they organized one large cooperative or several smaller ones,[53] and second, that the statute allowed a common marketing agent and "it must have been contemplated that a common marketing agency would fix the same prices for the products of all of its principals and would not discriminate among them."[54] He concluded:

> that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws provided that no other person that is not such an organization or a member of such a group is a part of the combination.[55]

At the time the above case was moving through litigation, the Sunkist Growers were defending a treble damage case which finally went to the United States Supreme Court.[56] Sunkist was alleged to have entered a conspiracy with a wholly-owned subsidiary and with an affiliated processing cooperative, to the damage of the plaintiff. The Supreme Court reasoned along the same lines as did Judge Holtzoff,[57] concluding:

> That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts.[58]

Finally, with regard to price fixing, it should be mentioned that resale price maintenance is prohibited under the *Borden* case be-

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51. Frequently, farmers unknowingly atempt to use this method since: (1) they solve their problems by group action and expect others to do likewise, and (2) this method solves the problem of gaining recognition as a bargaining unit from individual purchasers.
52. United States v. Maryland Cooperative Milk Producers, Inc., *supra* note 46, at 153.
53. *Id.* at 154.
54. *Id.*
55. *Id.* at 155.
56. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).
57. *Id.* at 29.
58. *Id.*

cause of the necessity for agreeing with "other persons" in order to establish the control.

B. *Production Limitation*

The dicta is legion that associations may not, by terms of their marketing contracts and membership agreements, regulate the production of members.[59] Such incidental and voluntary restrictions or production as may result from an association's educational bulletins, market reports, forecasts and recommendations are not illegal.[60] The *List Case*,[61] however, is not the best authority because (1) there was an obvious surplus causing public expense, (2) the United States Department of Agriculture was seeking voluntary production restrictions, and (3) the efforts of all were unsuccessful.

Adding further to the above non-authority is *United States v Grower-Shippers Vegetable Ass'n*[62] which is frequently cited as saying that group crop destruction done otherwise than pursuant to a government production control program is illegal. Had the case been decided on its merits, however, in the Government's favor, it would be poor authority for it involved a trade association rather than a producers cooperative.

While it is doubtful that bargaining associations have any antitrust privilege to control production, the rule ought to be otherwise for the following reasons:

1. Price is a function of supply (among other things) and no cooperative can do much about price without some control over supply. In fact, judging from the experience of various Secretaries of Agriculture, no cooperative can do much about price *with* some control over supply.

2. The Capper-Volstead Act allows collective activity in preparing products for market, which can be construed to include production without torturing the words greatly; assuming the statute is remedial, it ought to be liberally interpreted to effect is purposes.

3. Under the widely embraced entity theory a cooperative and its members are one unit just as is an industrial enterprise.

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59. *See, e.g.*, California Bean Growers' Ass'n v. Rindge Land & Nav. Co., 199 Cal. 168, 248 P. 658 (1926); Tobacco Growers' Co-op Ass'n v. Jones, 185 N.C. 269, 117 S.E. 174 (1923); Stark County Milk Producers Ass'n v. Tabeling, 129 Ohio St. 159, 194 N.E.16 (1934); Washington Cranberry Growers Ass'n v. Moore, 117 Wash. 430, 201 P. 773 (1921), *aff'd. on rehearing* 204 P. 811 (1922).

60. List v. Burley Tobacco Growers' Co-op Ass'n, 114 Ohio St. 361, 151 N.E. 471, 478 (1926).

61. *Id.*

62. Civil No. 30561, D.D. Cal., May 18, 1951, CCH FED. ANTITRUST LAWS Case No. 1084, dismissed as moot, *aff'd per curiam*, 344 U.S. 901 (1952).

The latter units regulate their production; the cooperative entities could, too, if the theory were applied without reservation.

4. Since Section 2 of the Capper-Volstead Act prohibits undue enhancement of prices, the public interest is adquately protected against the possibility that a cooperative, exercising control over production, would act irresponsibly. There should be no reason for government supervision of production restrictions because of the many substitute products, both natural and artificial, available and because of the Secretary of Agriculture's jurisdiction over prices.

It is clear that associations may not agree with other persons to limit either production or distribution of raw or processed agricultural commodities.[63]

C. *Attempts to Monopolize*

Section 2 of the Sherman Act[64] is hard to apply to cooperatives. The very effort of farmers to associate into a successful bargaining group is nothing more or less than an attempt to monopolize some part of commerce. Their intent does not differ appreciably from that of the gentlemen of yesteryear who were trying to corner a market. The manner in which cooperative growth is achieved governs application of Section 2.

The attempt of the Dairy Co-op Association to monopolize the Portland milk market has already been mentioned, along with its success in Judge McColloch's court.[65]

Probably the most significant Section 2 case is that of *North Texas Producers Ass'n. v. Metzger Dairies, Inc.*,[66] a civil action for treble damages sent to the jury solely on Sherman Act, Section 2, issues. The complaint charged the association with attempting to monopolize the Dallas-Fort Worth milk market and alleged that the dairy cooperative controlled 85 to 90 percent of the market supply and nearly all of the milk transportation, refused to transport milk for non-members or sell milk to the plaintiff unless it stopped dealing with non-members, had purchased milk processors in the area and had secretly tried to purchase the plaintiff, and had conducted boycotts and other coercive activities against the plaintiff.

The court found that the association had increased the price,

63. Flordia Citrus Mutual, *supra* note 38.
64. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964).
65. United States v. Dairy Co-op Ass'n, 49 F.Supp. 475 (D. Ore. 1943). Actually, it is not fair to be too harsh with Judge McColloch, for even today the "other persons" rule is nearly all-pervading, and no more solid test has been devised for areas of illegal activity not prohibited because of the *Borden* rule.
66. 348 F.2d 189 (5th Cir. 1965). If it is not significant as a legal guidepost, it is at least significant for the jury's treble damage award of $1,095,000.

through bargaining, to 30 cents above the base price fixed by the market administrator under a federal marketing order. The plaintiff refused to agree to association demands and used its two trucks to haul milk from distant markets at substantiallly greater cost. To increase its economic pressure, the association (1) tried to cut off plaintiff's sources of supply, (2) tried to buy plaintiff out, and (3) conducted primary and secondary boycotts of plaintiff's products.

The plaintifff capitulated, but the association accepted such conditionally, trying to extract promises that the plaintiff would not purchase milk except from association members and that it would turn control of hauling over to the association.

On these facts, the court said, "We conclude that the jury could reasonably find from the evidence that the Association engaged in monopolistic practices or attempts to monopolize prescribed by Section 2 of the Sherman Act."[67]

The Justice Department's complaint in the recent *N.F.O.* case[68] was based entirely on Section 2 of the Sherman Act. These recent cases support the rules suggested in Judge Wyzanski's jury charge that cooperatives may, by natural, voluntary growth come to acquire 100 percent of the market, but growth by other means—such as by coercion or predatory practices—is not a legitimate object of cooperatives and is not, therefore, within the cooperatives' privilege under the antitrust laws.[69]

Finally, with regard to Section 2, definitions of the relevant market may not be pleasing to leaders and attorneys of cooperative associations. One might think that the great opportunities for substitution of one food for another would invoke the "rule" of the *Cellophane* case.[70] There is some evidence that the relevant

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67. *Id.* at 196.

68. United States v. Nat'l Farmers Organization, *supra* note 39. Paragraph II of the complaint read as follows: "In effecting the offense above, defendant has, among other things:

> (a) through threats, intimidation, harassment and acts of violence, attempted to induce and induced non-member farmers not to sell milk and not to sell milk and not to deliver milk to processors;
>
> * * *
>
> (c) through threats, intimidation, harassment and acts of violence, attempted to induce and induced processors to cease operations and not to receive milk."

69. Cape Cod Food Products, Inc. v. Nat'l Cranberry Ass'n, 119 F.Supp. 900 (D. Mass. 1954) (jury charge). Since the jury verdict was for the defendant, there was no appeal and the instruction to the jury has not been firmly established as good law. No doubt the "100 percent of the market" suggestion is unfavorably regarded in the Department of Justice, so one may reasonably expect future complaints under Section 2 to allege that monopoly powers have been acquired to an *extent* not permitted by law, as well as in a *manner* not permitted by law. Indeed, such allegations were made in the amended complaint in United States v. Maryland & Virginia Milk Producers Ass'n, 167 F.Supp. 45 (D.D.C. 1958).

70. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (Dictum). The relevant market was said to be wrapping materials (paper, foil, plastics, etc.) rather than cellophane alone.

market for agricultural products will be rather narrowly drawn.[71]

D. *Mergers*

Merger cases are meager, in the antitrust and agricultural marketing associations area. At the present time, although it is difficult to predict, cooperative mergers with other persons are tested by approximately the same standards as are applied under section 7 of the Clayton Act[72] to other businesses.

The test case for section 7 was *Maryland & Virginia Milk Producers Ass'n. v. United States*,[73] where the trial court found that the cooperative, supplying about 86 percent of the milk in the Washington, D. C., area, acquired the Embassy Dairy in order to:

> . . .eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to Baltimore, thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract milk bidding; and increase the Association's control of the Washington market.[74]

On these facts, the Supreme Court found that a section 7 violation had occurred and affirmed the District Court judgment for the government on that section.

The Court had little trouble with the Association's Capper-Volstead defense, finding nothing in the Act and its legislative history to

> suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monoply by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way.[75]

The case ended with a divestiture order and thus is likely to be the classic merger case for cooperatives, just as *Borden* is on price-fixing.

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71. *See* Sunkist Growers, Inc. v. Case-Swayne Citrus Prod. Co., 369 F.2d 449 (1966), *cert. den.* 387 U.S. 932 (1967). Appellee sought to establish that entire country was the relevant market, relying on *Cellophane*, but the decision held that the orange-growing area in California and Arizona was the relevant market.

72. 38 Stat. 731 (1914), 15 U.S.C. § 18 (1964). This section prohibits a corporation engaged in commerce from acquiring all or any part of the assets of another corporation so engaged where the effect may be to tend to create a monopoly or substantially lessen competition.

73. 362 U.S. 458 (1960).

74. *Id.* at 469.

75. *Id.* at 466-67.

the acquisition alone was not decisive of the case.[76] Instead, the acquisition taken with the manner in which the acquired dairy was operated, in addition to other activities of the cooperative, was found to be a predatory practice unprotected by Capper-Volstead.[77]

Whether section 7 can have any application to a merger of competing cooperatives remains to be seen. One would rather expect that Judge Holtzoff's rule[78] that cooperatives can combine so long as no other persons are a part of the combination would apply.[79]

IV. BARGAINING—WHAT TO AVOID

After several years of losses from withholding and dumping of commodities, non-recognition by purchasers, or mere lack of success, producer-members of bargaining associations may seek to drive hard bargains when the opportunity presents itself. The lawyer who aids such glee may soon wish he had exercised restraint.

A. *Exclusive Dealing*[80]

At the outset, all thought of agreements which require processors to purchase solely from association members should be quashed. No better device can be developed to increase association membership and bargaining power than the "closed shop," but it is entirely coercive and, hence, illegal.[81] Agreements requiring processors to receive all production of members before receiving any from non-members may be coercive and therefore suspect. The cases, however, are all over the lot.

The first significant case for cooperatives considering full supply contracts would caution not restraint but avoidance,[82] and it was

76. Bergjians Farm Dairy Co. v. Sanitary Milk Producers, Inc., 241 F.Supp. 476 (E.D. Mo. 1965).

77. *Id.* The court rather routinely applied the "other persons" rule to dispose of the case. The rule is so easy to apply that the cases can be disposed of essentially without any reasoning at all; furthermore, the Justice Department can get into court simply by alleging agreements with other unknown persons not made defendants. There is some doubt that the rule, when written, was intended to be as all-pervading and as onerous as it has become, although the *Bergjians* result is hard to criticize.

78. United States v. Maryland Cooperative Milk Producers, Inc., 145 F.Supp. 151, 154 (D.D.C. 1956).

79. The deciding case may begin when a bargaining association acquires a processing cooperative in order to gain additional members and some influence in the resale market. While the United States Supreme Court has been presented some of these facts, it has not been presented with a timely issue. *See* Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962). *Winckler* dashed the hopes of some that a broad rule would be established prohibiting conspiracies between a cooperative, its wholly-owned subsidiary and an affiliated cooperative. But it did not entirely lay to rest some concerns about cooperative mergers or intra-organization conspiracies.

80. Perhaps a word should be said about contracts between cooperatives and their members. Such contracts frequently provide that the member must market exclusively through the association, and these restrictions are universally upheld, at least so long as they run for a reasonable period of time with reasonable opportunity for members to cancel.

81. *See* United States v. Louisiana Fruit & Veg. Prod. Union, Criminal No. 24906, CCH FEDERAL ANTITRUST LAWS Case No. 1173, (E.D. La., Apr. 28, 1954) (pleas of guilty entered).

82. Columbia River Packers Ass'n v. Hinton, 34 F.Supp. 970 (D. Ore. 1939).

decided by Judge McColloch, the man who in *Dairy Co-op* encouraged cooperatives to think they were immune from antitrust law. The case enjoined a fishermen's union from enforcing a full supply contract which it had negotiated with a fish canner.[83] The *Borden* case provided the foundation for the decision,[84] the court viewing the agreement as a conspiracy with another person to eliminate competition in sales to canners.

An opposite result was reached by the Federal Trade Commission, which upheld under Capper-Volstead a combination of (1) grower contracts which required growers to market only to handlers which had contracts with the association and (2) handler contracts which required handlers to use only raw products of members or, if the association consented, products of non-members on the same terms as would be applicable to members.[85] The F.T.C. decision did not discuss *Borden,* market foreclosure or other factors, apparently finding such cooperative desires legitimate objects for mutual benefit of members.

The middle ground between fish and fruit is represented by a milk case in which the cooperative negotiated a full supply contract to the extent it was able to provide supplies.[86] Since such a contract does not entirely foreclose other suppliers, the agreement was upheld. There was no showing by the government, however, that the contracts were negotiated to suppress competition, and such a showing might have changed the result.

Probably a percentage-of-requirements contract has the best chance for survival. If a full supply contract has economic justification and there are a significant number of other buyers in the market, there seems now to be enough case law to avoid a blind application of *Borden* to exclusive dealing.

B. *Refusals to Deal.*

There are not enough relevant cases applying antitrust law to cooperatives to write a concise rule as to when an association may, and when it may not, refuse to deal with a handler.

Of course, if the refusal is based upon the handler's financial situation or unfavorable past experiences with him, no problem is likely to result.

On the other hand, if the refusal is carried to the point it was

83. The case was decided under the Fishermen's Collective Marketing Act. 48 Stat. 1213 (1934), 15 U.S.C. §§ 521-22 (1964), which parallels the Capper-Volstead Act, and is frequently used as authority in agricultural decisions.

84. *Supra* note 82, *aff'd* 131 F.2d 88 (9th Cir. 1942).

85. Florida Citrus Mutual, 53 F.T.C. 973, 1010 (1957).

86. Maryland & Virginia Milk Producers Ass'n. v. United States, 193 F.2d 907 (D.C. Cir. 1951), *reversing* 90 F.Supp. 681 (D.D.C. 1950).

in *North Texas Producers Ass'n*,[87] with a secondary boycott at retail stores and many acts indicating a monopolistic purpose, there is every reason to believe the refusal has no Clayton or Capper-Volstead protection from severe antitrust penalties. In the absence of various other attempts to increase market control, a naked refusal to deal is probably insufficient to cause antitrust concerns.

If a handler refuses to submit to the negotiating process, there can be little doubt that the association may forbid its members to deal with him. If, however, the handler merely refuses agreement to unessential terms, especially exclusive dealing arrangements, the hope that Capper-Volstead may save the day wanes.

Refusals to sell products of like grade and quality at the same prices may bring Robinson-Patman difficulties; but since the prices of agricultural products fluctuate so frequently, the danger is minimal so long as price demands are reasonable or entirely uniform.

Tied closely to the subject of refusals to deal is picketing and group demonstrations, such as have been used by N.F.O. upon occasion. During the N.F.O. milk withholding in March and April of 1967, a temporary restraining order was issued which prohibited the organization from engaging in any variety of picketing other than peaceful, and which limited the number of pickets at any one place to four.[88] A more recent case[89] denies two organizations of Western Pennsylvania dairymen antitrust and constitutional protection for picketing retail stores in an attempt to induce the stores to increase farmers' prices and stop dealing with a cooperative competitor. A permanent injunction was granted preventing future picketing and boycotts.[90]

While the two cases above can be read for the rule that ineffective picketing is legal while effective picketing is illegal, surely the law is not so foolish. Picketing can be a useful practice in bargaining for the sale of agricultural products. Since public policy favors cooperative marketing, it is predictable that peaceful and intelligent use of pickets, either for recognition or to build pressure during

87. *Supra* note 66 and the accompanying text.

88. United States v. Nat'l Farmers Organization, Inc., BNA ATTR No. 299, p. A-2 (S.D. Iowa Apr. 4, 1967). It is interesting to note that the N.F.O. was withholding all over the country, which displays an intention to monopolize rather than an attempt to market. Why else would a seller refuse to deal with every available buyer and choose rather to dump milk on the ground? The Justice Department specifically did not seek, and the court did not grant, any order prohibiting the then current or any future market boycott. There likely was some feeling that Capper-Volstead permits such an action by the association. Query whether the same feelings would exist if there was a possibility that such action would succeed?

89. Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F.Supp. 381 (W.D. Pa. 1966).

90. *Id.* The N.F.O. may have been far-sighted to settle out of court with the government, pledging to give the Justice Department advance notice of any future withholding actions and not to oppose future preliminary injunctions. These commitments extend through 1972. BNA ATTR No. 334, p. A-13 (Dec. 5, 1967).

negotiations, will not be enjoined so long as it is used for limited, reasonable objectives.

V. THE OTHER SIDE OF THE COIN

Bargaining cooperatives can expect that their birth and operations will not be greeted with the warmest kind of enthusiasm by processors, packers and other handlers. After all, any manufacturer aims to obtain his raw product at the lowest possible cost, and handlers of agricultural products seem to have similar objectives.

What may an association expect and what remedies are available?

During the period of organization, some handlers have apparently indicated to growers that they would or might lose their product market if they joined a bargaining group.[91] In many areas, any overt indication by an important buyer or contractor that he is displeased with the organizational effort may have a startling effect, encouraging reluctance on the part of farmers to join. There is at present no adequate legal remedy which may be used by an association in its formative stages to prevent intimidation, coercion and interference with farmers' and ranchers' rights to join and belong to marketing and bargaining associations.[92] A bill pending in the United States Congress would provide this remedy.[93]*

Once organization is completed and operations are begun, new problems arise, the foremost of which is refusal on the part of handlers to recognize or deal with the association of producers. Today, such disputes must be settled entirely by economic power; no law exists and no bill is pending, at least at the federal level, which requires recognition and good faith bargaining. That is not to say, however, that public debate has not given serious consideration to the possibility of such a law.[94] The National Farmers Organization is, for the most part, at this stage today, and their fight for recognition is as much in the newspapers as anywhere else, as is the case with some of the Farm Bureau marketing associations and others. The only real solution presently is not a legal one; rather it is to increase membership to the point where some handlers deal with the association in order to obtain needed supplies. This approach to recognition, however, thrusts the operating cooperative back into organizational problems.

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91. *Hearings on S.* 109 *Before a Subcomm. of the Senate Comm. on Agriculture and Forestry*, 89th Cong., 2d Sess. 21-24 (1966) [hereinafter cited as *S.* 109 *Hearings*].

92. *Id.*

93. S. 109 was passed by the Senate August 4, 1967, passed by the House Committee on Agriculture on September 27, 1967 and is, at the time of this writing, pending before the House Rules Committee. * *Editor's Note*: S.109 was enacted into law on April 16, 1968, subsequent to Mr. Lemon's writing of this article. See 36 U.S.L.W. 97 (April 30, 1968).

94. *See* Wall Street Journal, Nov. 13, 1967, at 24, Col. 1.

The matter of contract negotiations is, to some extent, governed by Section 5 of the Federal Trade Commission Act.[95] The F.T.C. has taken note of producers problems in attempting to collectively sell agricultural products.[96] The problem which has been encountered with the F.T.C. remedy is that it is too slow. In early 1952, certain processors were charged by the Commission with conspiring to boycott certain producers. Not until mid-1956 did the F.T.C. issue a cease and desist order, and court appeals followed.[97] Thus, no adequate remedy was available for the negotiating problem of the 1951 season.

The same problems of delay are found in Packers & Stockyards Act application.[98] A complaint that Ralston Purina Co. and other blacklisted and boycotted poultry growers in 1962 was terminated, assuming there are no court appeals, on January 23, 1968 by the issuance of a cease and desist order against the processing firms.[99]

S.109, now pending, would provide timely injunctive relief in some of these situations.

If, because of lack of negotiating strength, an association can market some product successfully, but not all of what it has available, it may fall into illegal activities before it has a chance to succeed. Discrimination among members and granting some members advantages over others can lead to trouble.[100]

VI. REFLECTIONS

The possibilities for improving farm income through collective bargaining in the sale of agricultural products may be overrated. Nevertheless, there is room for increased marketing efficiency —through advance contracting, producing to specifications, etc.— which can result from bargaining.

Very little can be borrowed from labor's experience and applied directly to agricultural marketing associations, for several reasons. First, the time is the late Sixties rather than the Twenties and Thirties, and public sensibilities have changed. Second, government intervention in labor disputes has generally been helpful to labor, but such cannot be expected in agriculture because the connection

95. 38 Stat. 719 (1914), 15 U.S.C. § 45 (1964). The section declares unfair methods of competition and unfair or deceptive practices or acts to be unlawful.

96. *S.* 109 *Hearings, supra* note 91, at 34-36.

97. *Id.* at 36.

98. 42 Stat. 161 (1921), 7 U.S.C. § 192 (1964). The terms are approximately the same as section 5 of the F.T.C. Act. but they relate to packers, dealers and handlers of livestock and meats.

99. —Agr. Dec.—; Wall Street Journal, Jan. 26, 1968, at 14, col. 8.

100. *Cf.* California Canning Peach Growers v. Downey, 76 Cal. App. 1, 243 P. 679 (1925); Wheelwright v. Pure Milk Ass'n, 208 Wis. 53, 242 N.W. 486 (1932).

between bargaining and consumer prices is clearer to the public in the case of food. Third, farmers and ranchers are private enterprisers, free and able to expand production whenever there is a price incentive to do so. The adverse effects of rising wage rates for labor are not physical surpluses and consequently are not readily apparent. Thus, there is in labor no pressure for the government to allocate jobs in the high-wage industries.

As producers increasingly turn greater interest toward marketing, little leniency or sympathy can be expected from persons who administer trade regulation laws. Some specialized groups of commodity producers, located in compact geographical areas, have formed marketing cooperatives which have become very influential and successful. The courts are beginning to recognize the fact that these cooperatives are big business and are treating them as such. The resulting case law, however, is equally applicable to the fledgling upstarts seeking to associate widely-dispersed producers of basic commodities and livestock to bargain with giants of American industry.

Much more will be needed for success than an attorney able to walk the producer associations' antitrust tightrope, but that man is a necessary ingredient. Advice which is too cautious may be as harmful to the effort as would be a cease and desist order resulting from carefree advice. The best that can be said is that any lawyer who can guide a powerful association through Sherman, Clayton and the rest without losing his grip on Capper-Volstead can render significant service to his profession, to agriculture and to the Nation.