

## Cooperative Production Limits: A 4-Course Antitrust Meal

*Law360, New York (April 05, 2012, 1:27 PM ET)* -- Since 1914, the conduct of agricultural cooperatives has been mostly exempt from antitrust liability. This immunity is found in Section 6 of the Clayton Act, which protects labor unions and farmer-producer cooperatives in the “carrying out th[eir] legitimate objects,”[1] and in the Capper-Volstead Act, which clarifies that such “legitimate objects” include “collectively processing, preparing for market, handling, and marketing” products for members’ “mutual benefit.”[2] Under these statutes, the internal activities of qualifying cooperatives are treated as any other business corporation by antitrust laws.[3]

But since Capper-Volstead’s passage in 1922, courts have faced the delicate task of defining what conduct benefits from the immunity and what conduct does not. For example, the U.S. Supreme Court found the immunity does not extend to cooperatives with certain nonproducer members.[4] Courts have also held that qualifying cooperatives cannot conspire with a nonexempt party to restrain trade,[5] boycott a processor because it serves competitors,[6] or engage in price discrimination prohibited by the Robinson-Patman Act.[7]

Now antitrust plaintiffs are introducing new challenges to producers’ efforts to control price through production limits. They argue that these output-reducing activities are not “processing, preparing for market, handling, and marketing” activities protected under the act. Defendants argue that those named activities — which essentially permit cooperatives to act as a unified enterprise in pricing and marketing — necessarily provide for the ability to limit member production as a means to control pricing. As one defendant put it, “price fixing and output restrictions are two sides of the same coin.” These arguments are playing out in these currently litigated cases:

### **Mushrooms: In re Mushroom Direct Purchaser Antitrust Litig.**

*In re Mushroom Direct Purchaser Antitrust Litig., Case Nos. 06-0620; 06-0638; 06-0657; 06-0677; 06-0861; 06-0932; 06-1464; 06-1854 (E.D. Pa.)*

Mushroom growers have been sued in the Eastern District of Pennsylvania about allegations over, among other things, land sales that prevented mushroom farming. In 2009 the district court denied a motion for summary judgment based on Capper-Volstead because one of the cooperative’s members was not a grower.[8] The court alternatively concluded that the facts did not rule out a price-fixing conspiracy with a nonmember cooperative, further narrowing the immunity. The Third Circuit denied interlocutory appeal,[9] and one of the largest mushroom growers in the country just settled (the terms of which have not been disclosed).

Neither the district court nor the Third Circuit analyzed the allegation that the cooperative reduced land for mushroom growing. So whether such conduct would be immune under Capper-Volstead may arise if the case proceeds and the issue is addressed on appeal.

### **Eggs: In re Processed Egg Prods. Antitrust Litig.**

*In re Processed Egg Prods. Antitrust Litig., MDL No. 2002, 08-md-02002, 2:12-cv-88 (E.D. Pa.)*

Also in the Eastern District of Pennsylvania, egg producers were sued by Kraft Foods Inc. and other direct purchasers under the Sherman and Clayton Acts. The egg plaintiffs allege that the egg market is inelastic, and that the egg cooperatives took various measures to control supply of that market, including reducing “flock inventory,” inducing early “molting” (the natural and seasonal process for hens to stop producing eggs), adopting guidelines for increased cage space “under the pretext of animal welfare,” and exporting eggs to decrease domestic supplies.

The plaintiffs take the position that Capper-Volstead does not apply to the defendants because of nonproducer membership, but also argue that the alleged “pre-production supply control program falls outside the scope” of Capper-Volstead. The case was recently consolidated for multidistrict litigation in Pennsylvania, and plaintiffs filed an amended complaint in February.

### **Milk: Stephen L. LaFrance Holding Inc. v. Nat’l Milk Producers Federation; Edwards v. Nat’l Milk Producers Federation**

*Stephen L. LaFrance Holding Inc. v. Nat’l Milk Producers Federation, No. 2:12-cv-00070 (E.D. Pa.); Edwards v. Nat’l Milk Producers Federation., No. 3:11-cv-04766 (N.D. Cal)*

The Eastern District of Pennsylvania may see a third MDL action that addresses whether a cooperative can limit production when it decides whether four cases against the dairy industry should be consolidated there. The Pennsylvania action followed three indirect-purchaser claims filed and consolidated in the Northern District of California in late 2011.

The cases are all based on alleged efforts by dairy farmers to manage their milk prices by bringing dairy cows to slaughter, a program termed “herd retirement.” The plaintiffs, like those in the egg and mushroom cases, take the position that Capper-Volstead does not apply because the cooperatives include certain nonproducers. And like in the egg case, the plaintiffs also say Capper-Volstead does not apply to “restraints on production.” Direct purchasers sued in Pennsylvania in January 2012, and an MDL panel is weighing consolidation.

### **Potatoes: In re Fresh & Process Potatoes Antitrust Litig.**

*In re Fresh & Process Potatoes Antitrust Litig., No. 4:10-MD-2186 (D. Id.)*

The cases pending in Pennsylvania may be influenced by ongoing litigation in and a preliminary ruling from the District of Idaho. In *In re Fresh & Process Potatoes Antitrust Litigation*, direct and indirect purchasers allege that defendant potato growers reduced the potato supply as part of their efforts to control their pricing. The allegations are that defendants implemented a plan to limit planting acreages and paid farms to stop growing potatoes to reduce output.

In December 2011 the district court denied a motion to dismiss based on Capper-Volstead.[10] Facing the argument that the act did not apply because of nonproducer involvement, the court adopted a fact-intensive test to determine whether the history and economics of the product's marketing, and the "degree of integration" of nonproducer participants, negated the immunity. According to the court, that issue could not be decided on the pleadings. The court then stated in dicta that it believed the activities alleged were excluded from the act because they involved "production limitation." Plaintiffs amended their complaint in late January.

## Conclusion

These cases have their nuances, and the mushroom and potato cases suggest that fact determinations may affect how the courts will apply Capper-Volstead — for instance, a fact-based assessment of the economic necessity of controlling production in managing cooperative pricing may have impact on the analysis.

And there may be a salient difference between efforts to control production internally among coop members (as appears the case in the egg and milk cases), as opposed to efforts to inhibit nonmembers from producing (like in the mushroom case). In any event, these decisions will force the courts to define the boundaries of the antitrust exemption and ultimately may have wide-ranging effects on the price of your morning omelet and hashbrowns.

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[1] 15 U.S.C. § 17.

[2] 7 U.S.C. § 291.

[3] 1-1 Agricultural Law § 1.03[11][c].

[4] Case-Swayne Co. v. Sunkist Growers Inc., 389 U.S. 384, 395-96 (1967)

[5] United States v. Borden Co., 308 U.S. 188, 203-05 (1939)

[6] Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 468 (1960).

[7] Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 484 (E.D. Mo. 1965), aff'd 368 F.2d 679 (8th Cir. 1966).

[8] 621 F. Supp. 2d 274, 286 (E.D. Pa. 2009).

[9] 655 F.3d 158 (3d Cir. 2011).

[10] Case No. 4:10-md-2186, 2011-2 Trade Cas. (CCH) P77,739, 2011 U.S. Dist. LEXIS 138777 (D. Id. Dec. 2, 2011).