

The Policy Environment: What's on the Horizon?
An Update on Antitrust and Capper-Volstead

Presentation to the
Farmer Cooperatives Conference

Michael A. Lindsay

DORSEY & WHITNEY LLP

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Outline

- Antitrust Basics
- Capper-Volstead Basics
- Structural issues
 - Who can a cooperative include as members?
- Behavioral issues
 - What conduct can a cooperative engage in?
- *Eggs, Potatoes, Mushrooms, Milk*

Antitrust Basics

- Antitrust is based on a policy that favors consumers
 - Lower prices, higher quality, better service, more innovation
- Competition is the means to achieve this policy goal
 - Competition drives producers to do better

Agreements in Restraint of Trade

- Agreements that unreasonably restrain trade are illegal
- Some agreements are “per se” or automatically illegal
- Other agreements are judged on a “facts and circumstances” basis
 - “Rule of Reason”
 - “Quick Look”
- Common theme: effects on competition
- Most (but not all) problems arise from agreements with competitors (“horizontal” agreements)

Capper-Volstead

- Provides an antitrust exemption for existence and certain conduct of qualifying cooperative organizations
- Applies to associations of “persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers”
 - Who is the “person” (entity identification)?
 - What if the “person” does more than just “production” (vertical integration)?

Capper-Volstead, cont'd

- “act[ing] together . . . in collectively processing, preparation, handling, and marketing . . . such products of persons so engaged”
 - What if pre-production coordination is necessary or helpful for post-production collective marketing?
- . . . in associations “operated for the mutual benefit of the members thereof, as such producers”
 - What is the significance of “as such” if the “persons” are more than just “producers” (vertical integration)?

Capper-Volstead, cont'd

- . . . as long as association *either*
 - allows no more than one vote per member, or
 - pays no more than 8% dividends on stock or membership capital
- *And* does not “deal in the products of nonmembers to an amount greater in value than such as are handled by it for members”

In re Mushrooms Antitrust Litigation

- DOJ investigation
 - Consent decree prohibiting certain form of “supply management” (acquisition and elimination of nonmember assets)
- District court
 - At least one member entity was not a *producer* – thus, no Capper-Volstead protection
 - Allegations of price-fixing with non-member distribution company



Mushrooms in the Third Circuit

- No appellate jurisdiction over interlocutory appeal, and no ruling on merits
 - “Not effectively unreviewable on appeal from final judgment”
 - Capper-Volstead provides immunity from liability, but not from civil suit
 - But does provide immunity from “prosecution by the government”
- One positive: court acknowledges importance of issue
 - “the question, whether the arguably inadvertent inclusion of an ineligible member strips an agricultural cooperative of Capper-Volstead protection, is both serious and unsettled”



In re Potatoes Antitrust Litigation

- District court denies motion to dismiss
- Core allegation is that cooperative was created to increase the price of potatoes through “supply management”
 - Agreements to limit potato planting acreages
 - Payments to member farmers to either destroy existing stocks or refrain from growing additional potatoes



Vertical Integration

- Rejects proposition that “a farming operation is an eligible participant under Capper-Volstead, even if it is a fully integrated operation which extends from spring planting to the grocery store warehouse”
- Also rejects “bright line rule that any degree of vertical integration disqualifies a farming operation from participating in a Capper-Volstead eligible association.
- Essentially adopts Justice Brennan *National Broiler* concurrence

Vertical Integration, cont'd

- Analysis will require “a factually-intense inquiry . . . [that] focuses on the economics and history of potato marketing, the actual functions of the associations, and the degree of integration of the participants”
- Requires a factual record for determination
 - Allegations of agreements with non-producers may also preclude Capper-Volstead protection

Potatoes and Supply Management

- Court distinguishes “a pre-production agricultural output limitation” from “a post-production marketing decision such as withholding of product from market”
- “coordinating and reducing acreage for planting is not allowed”
 - Plain language of statute
 - DOJ, FTC, USDA comments



Cooperatives and Foreign Producers

- Allegations of agreements with foreign producer associations
 - No allegation of foreign *members*
- “an association does not lose its Capper-Volstead exemption by including, among its members, foreign corporations or legal entities”



Potatoes and Member Liability

- Declines to dismiss claims against grower-members
- Potentially distinguishable from other cooperatives:
 - “these defendants did not merely join an extant trade association and then choose whether or not to follow suggested guidelines; rather, plaintiffs alleged that they first agreed to the conspiracy outlined in the complaint, and then created the trade associations to formalize and implement that agreement”

In re Processed Eggs Antitrust Litigation

- Complaint filed in 2008
- Alleges “an overarching agreement to manage the aggregate supply of eggs in the United States . . . thereby affecting the price of eggs” through –
 - A series of agreed “flock reductions”
 - “Guidelines on cage space densities for hens”
 - Egg export program



Processed Eggs

- Initial decision is primarily a *Twombly* decision (sufficiency of pleadings)
- A side note
 - Certification program vs. supply management

Certification

- Program appears to have been entirely voluntary, and it permitted growers to communicate valuable information
 - “By complying with the guidelines, producers could sell “UEP-certified eggs” and affix a logo on packages to reflect that the eggs were certified under the Program.”
 - Consumers presumably might value that information



Certification, cont'd

- Later version provided for companywide compliance, rather than product-specific compliance
 - “a company must commit to implementing the welfare guidelines on 100% of all production facilities. . . 100% of a producer’s egg houses . . . be maintained in accordance with the [UEP Certification Program] guidelines in order for a company to sell ‘UEP Certified’ eggs.”



CWT Antitrust Litigation

- Challenges program of National Milk Producers Federation for herd reduction
 - Voluntary, producer-funded
- Allegations that program succeeded in reducing herds, resulting in lowered production and higher prices
- Original motion to dismiss pending
 - Plaintiffs abandoned argument that defendant organizations include non-farmers
 - Court found Plaintiffs had not adequately alleged “predatory conduct” (which is outside AgSec’s jurisdiction); granted leave to amend



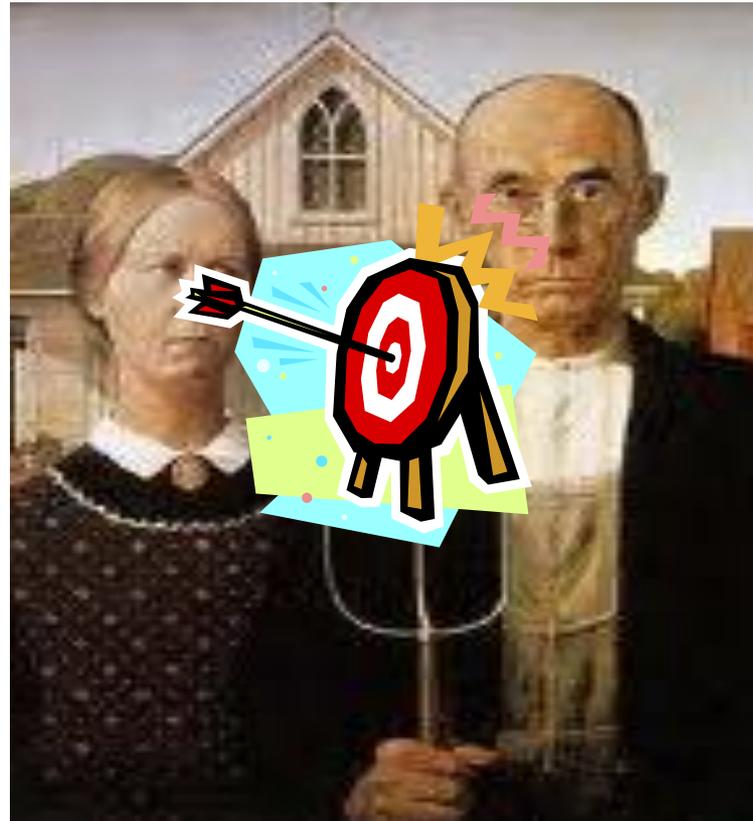
New

CWT Antitrust Litigation, cont'd

- Denial of second motion to dismiss (Nov. 2, 2012)
 - Secretary of Agriculture does not have exclusive jurisdiction to determine applicability of Capper-Volstead exemption
 - Court declines to refer to Sec Ag under “primary” jurisdiction because Sec Ag has no duty to issue a ruling, and court cannot impose duty (and Sec Ag not have “primary” jurisdiction anyway)
 - “Filed rate” doctrine not apply because claim is that agreements resulted in pricing above milk-order minimums (not below)
 - Statute of limitations = fact question



New



Thank you!

Michael A. Lindsay
Dorsey & Whitney LLP
50 South Sixth Street
Minneapolis MN 55402
612.340.7819
Lindsay.michael@dorsey.com

Case List

- *In re Processed Egg Products Antitrust Litigation*, MDL No. 2002: 08-md-02002 (E.D. Pa. Sept 26, 2011)
- *In re Fresh and Process Potatoes Antitrust Litigation*, Case No. 4:10-MD-2186-BLW (D. Id. Dec. 2, 2011)
- *In re Mushroom Direct Purchaser Antitrust Litigation*, 09-2257 (3d Cir. Aug. 23, 2011)
- CWT Litigation: *Edwards et al. v. National Milk Producers Federation*, No. C 11-04766 (N.D. Cal. Jul. 12, 2012)