

The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity

Christine A. Varney

The legal landscape that governs enforcement of the antitrust laws in the agricultural sector is a complicated one. This is especially true because the Capper-Volstead Act grants certain agricultural cooperatives limited immunity from the antitrust laws, permitting their members jointly to process, prepare for market, handle, and market their commodities.¹ The scope of the immunity or, alternatively, the extent of the limitations on it, raise important legal and policy questions, which require a full understanding of the markets in which these cooperatives work. Accordingly, in 2010, the Antitrust Division of the U.S. Department of Justice, in partnership with the U.S. Department of Agriculture, hosted a series of workshops across the country to explore competition issues affecting the agricultural sector. Session topics included crops, hogs, poultry, dairy, livestock, and price margins.² The workshops and decisions in recent private litigation³ will inform the Antitrust Division's thinking about these issues in many important ways.

The Origins of the Capper-Volstead Act and the Continuing Importance of Cooperatives

The Capper-Volstead Act represented the culmination of a long struggle by farmers to guarantee their right to organize cooperatives. Agricultural cooperatives appeared in America as early as 1804, when farmers in Connecticut organized a cooperative to market milk and milk products.⁴ Efforts to organize cooperatives gained steam in the second half of the 19th century, as farmers confronted, among other developments, the emergence of national railroads and consolidation in processing industries. By 1890, the year of the Sherman Act's passage, there were about 1,000 farmer cooperatives in the United States, with more than 700 handling dairy products, about 100 handling grain, and about 100 handling fruits and vegetables. Beginning around 1895, large, centralized cooperatives and federated regional associations began to emerge, and, by the time of the Capper-Volstead Act's passage in 1922, cooperatives were a major national presence in several agricultural sectors.⁵

With the passage of the Sherman Act and many state antitrust laws, widespread concern arose that these laws would be used against agricultural cooperatives. Some observers feared

■ **Christine Varney** is the Assistant Attorney General of the Antitrust Division at the United States Department of Justice. Special thanks to Patrick M. Kuhlmann, Sarah L. Wagner, and Andrea Agathoklis, all of the Antitrust Division, for their assistance in developing this article.

¹ 7 U.S.C. §§ 291–292.

² More information on the workshops is available at the Division's Web site, <http://www.justice.gov/atr/public/workshops/ag2010/index.htm>.

³ See Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 291 (direct purchaser complaint); Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 293 (indirect purchaser complaint); Class Action Complaint, *Brigiotta's Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-00307-CWD (D. Idaho June 18, 2010), ECF No. 1; Class Action Complaint, *Simon v. United Potato Growers of Idaho, Inc.*, No. 2:10-cv-04647-JST-VBK (C.D. Cal. June 23, 2010), ECF No. 1.

⁴ JERRY VOORHIS, *AMERICAN COOPERATIVES: WHERE THEY COME FROM, WHAT THEY DO, WHERE THEY ARE GOING* 80 (1961).

⁵ U.S. DEP'T OF AGRIC., *RURAL BUSINESS-COOP. SERV., COOP. INFO. REPORT 59, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT* 9–10, 19–21, 59–60 (2002).

that even the mere organization of small local farmers for mutual help could be viewed as violating the law. Indeed, some state courts sustained antitrust challenges to agricultural cooperatives, and, in response, state legislatures passed laws authorizing their existence.⁶

Congress did shelter some agricultural cooperatives with Section 6 of the 1914 Clayton Act, which provides that the antitrust laws shall not be construed to prohibit the existence and operation of agricultural organizations instituted for purposes of mutual help, if not for profit and not having capital stock.⁷ This statute also permits individual members of such organizations to carry out the “legitimate objects” of those organizations. Section 6 proved inadequate, however, as farmers were not certain what constituted “legitimate objects” of cooperatives and wanted to form capital-stock and for-profit cooperatives.⁸ Declining agricultural prices after the conclusion of World War I and prosecutions of cooperatives added additional impetus for change.⁹ Accordingly, in 1922, Congress passed the Capper-Volstead Act, which enumerated permissible activities for cooperatives and authorized capital-stock and for-profit cooperatives.¹⁰

The Capper-Volstead Act’s proponents viewed cooperatives as a bulwark against “middlemen” and “speculators” that unfairly preyed on both farmers and consumers. Small, individual farmers could sell their crops and livestock only to a few large corporate entities that then processed and distributed agricultural products. According to the Act’s proponents, these entities then paid farmers unjustifiably low prices while, in turn, charging consumers high prices.¹¹ This meant these large firms were “collecting [their] tribute from both the farmer and the consumer.”¹² As a result, farmers were made to abandon their homesteads and, ultimately, the country’s food supply was jeopardized.¹³

Cooperatives formed under the Capper-Volstead Act would address this situation by: (1) enabling farmers to combine, forming a countervailing power to bargain effectively with purchasers; and (2) enabling farmers to process, distribute, and market their products more efficiently and potentially bypass middlemen altogether.¹⁴ Thus, cooperatives were expected to benefit farmers

⁶ See *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 467–72 (1960).

⁷ 15 U.S.C. § 17. This provision also applies to certain horticultural organizations.

⁸ David L. Baumer, Robert T. Masson & Robin A. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 189–91 (1986).

⁹ See U.S. DEP’T OF JUSTICE, MILK MARKETING: REPORT OF U.S. DEP’T OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES 32–33, 49, 51 (1977) [hereinafter ANTITRUST IMMUNITIES REPORT]; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 356 (1975).

¹⁰ Additional agricultural exemptions followed the Capper-Volstead Act’s enactment. These include the Cooperative Marketing Act of 1926, which authorizes Capper-Volstead-type cooperatives to acquire and exchange “past, present, and prospective crop, market, statistical, economic, and other similar information,” 7 U.S.C. § 455, and the Agricultural Marketing Agreement Act of 1937, which exempts from the antitrust laws marketing agreements between the Secretary of Agriculture and processors, producers, associations of producers, and others engaged in the handling of agricultural commodities, 7 U.S.C. § 608b. Additionally, the Agricultural Fair Practices Act of 1967 makes it unlawful for handlers to coerce any producer in deciding whether to join a cooperative. 7 U.S.C. §§ 2301–2306.

¹¹ See, e.g., 62 CONG. REC. 2058–60 (1922) (statement of Sen. Capper).

¹² *Id.* at 2059.

¹³ See, e.g., 59 CONG. REC. 8031 (1920) (statement of Rep. Upshaw) (“So appalling is the need of greater production and so fraught with danger is the desertion of the farm for the congestion of the city that thoughtful, farseeing men are gravely concerned.”).

¹⁴ See, e.g., *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 824–26 (1978) (“By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.”); 62 CONG. REC. 2059 (1922) (statement of Sen. Capper) (claiming that cooperation “will cut costs of production and risk and reduce the spread between the consumer and the producer.”).

through “fair” prices for their output and also benefit ultimate consumers through lower prices for agricultural products.¹⁵ As Senator Capper, one of the Act’s namesakes, explained:

There is a nation-wide demand for greater efficiency all along the line. Cooperation . . . will cut costs of production and risk and reduce the spread between the consumer and the producer. Thus it will give farm products to the consumer cheaper and at the same time yield larger returns to the man who produces by eliminating much of the excessive cost of distribution under the present system in which speculation plays so dominant a part. Furthermore, participation by farmers in the marketing of farm products through cooperative associations, giving them the right to bargain collectively with buyers, will result in stabilizing the market, preventing waste, and, as I have said, bring about more efficient distribution. . . . The way to accomplish this is through cooperative marketing, which eliminates the unessential and speculative middleman, and which gives the producer and the consumer their due.¹⁶

Today, the importance of cooperatives to farmers is indisputable. Cooperatives handle, process, and market farmers’ products; negotiate with processors and other buyers on their behalf; enable them to purchase inputs at a discount; and provide them credit and other financial services. Their growth and scope is remarkable: According to one trade association, there are over 3,000 farmer cooperatives across the United States, whose members include a majority of our nation’s two million farmers¹⁷; in 2008, cooperatives had a total business volume of \$191.1 billion, had total assets of \$57 billion, and had members employing an estimated 250,000 people. Marketing and supply cooperatives accounted for a third of both total farm sector revenue and input purchases.¹⁸ This growth and dynamism was enabled by the passage of the Capper-Volstead Act.

Capper-Volstead Immunity and Current Litigation

The Capper-Volstead Act’s framers intended to empower farmers to bargain more effectively and to bring their products to market more efficiently. The grant of immunity, however, was not unbounded. As the Supreme Court observed, Congress did not intend “to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way.”¹⁹ Similarly, according to the House Report, “[i]nstead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporation so the farmers can take advantage of it.”²⁰

Accordingly, Congress imposed a number of specific limitations on the scope of immunity granted to Capper-Volstead cooperatives:

- The Capper-Volstead Act, by its terms, authorizes farmers to act together only “in collectively processing, preparing for market, handling, and marketing” their products.²¹

¹⁵ See, e.g., 60 CONG. REC. 363 (1920) (statement of Sen. Smith) (“While the farmer as the result of organization will receive more compensation for his labor, the ultimate consumer may expect to receive his product as a rule at a smaller cost.”).

¹⁶ 62 CONG. REC. 2059-60 (1922) (statement of Sen. Capper).

¹⁷ Nat’l Council of Farmer Coops., Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy (Dec. 30, 2009), available at <http://www.justice.gov/atr/public/workshops/ag2010/comments/255175.htm>.

¹⁸ *Cooperative Facts*, NAT’L COUNCIL OF FARMER COOPS., <http://www.ncfc.org/content/view/32/58/>.

¹⁹ *Md. & Va. Milk Producers Ass’n*, 362 U.S. at 467.

²⁰ H.R. REP. NO. 67-24 at 2 (1921).

²¹ 7 U.S.C. § 291.

- Membership in the cooperative must be limited to producers of agricultural products.²²
- The cooperative must operate “for the mutual benefit of [its] members.”²³
- The cooperative either must limit each member to one vote, regardless of the amount of stock or membership capital owned, or must limit dividends to eight percent per year or less.²⁴
- The cooperative must not “deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”²⁵
- The Capper-Volstead Act authorizes the Secretary of Agriculture to bring an administrative action against an association that “monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced.”²⁶

In addition, the Supreme Court has held that the Act does not shelter a cooperative when it employs “predatory” practices that violate Section 2 of the Sherman Act or when it colludes with others who do not enjoy immunity.²⁷

Some of these limitations currently are at issue in pending private lawsuits. In these cases, plaintiffs—buyers of agricultural products—have sued cooperatives, producers, processors, and others, claiming that the defendants violated federal and state antitrust laws by, among other acts, conspiring to restrict the production of agricultural commodities. For example, private party lawsuits against United Egg Producers, Inc., a cooperative of egg growers, egg producers, and others in this space, center on the claim that these parties conspired to raise egg prices by reducing the supply of eggs.²⁸

Similarly, lawsuits against the United Potato Growers of America, Inc. (UPGA), a federated cooperative with ten member cooperatives, United Potato Growers of Idaho, Inc. (UPGI), a cooperative and a member of UPGA, individual potato growers, potato packers and processors, produce companies, and others, center on an alleged overarching agreement to manage the supply of potatoes in the United States with the purpose of elevating the price of fresh and processed potatoes. Among other acts, UPGA and UPGI allegedly required members to limit acres planted and paid growers to destroy existing stocks or refrain from growing new stock.²⁹

The plaintiffs in these suits allege that these actions violate Section 1 of the Sherman Act, as well as state antitrust laws. Additionally, plaintiffs allege that the cooperatives and cooperative members are not entitled to Capper-Volstead immunity because the defendants conduct activities outside the scope of the Act’s protections and fail to satisfy the Act’s other requirements.

²² See *id.* (authorizing “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers” to form cooperatives); *Nat’l Broiler Marketing Ass’n*, 436 U.S. at 822–23.

²³ 7 U.S.C. § 291.

²⁴ *Id.* (stating that cooperatives either must not allow “more than one vote because of the amount of stock or membership capital he may own therein” or must not “pay dividends on stock or membership capital in excess of 8 per centum per annum”).

²⁵ *Id.*

²⁶ 7 U.S.C. § 292. One treatise reports that the Secretary has never used this power. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST* ¶ 249a, at 5 n.3 (3d ed. 2006).

²⁷ *Id.* & *Va. Milk Producers Ass’n*, 362 U.S. at 463–64. See generally AREEDA & HOVENKAMP, *supra* note 26, ¶ 249c.

²⁸ See Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 291 (direct purchaser complaint); Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 293 (indirect purchaser complaint).

²⁹ See Class Action Complaint, *Brigiotta’s Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-00307-CWD (D. Idaho June 18, 2010), ECF No. 1; Class Action Complaint, *Simon v. United Potato Growers of Idaho, Inc.*, No. 2:10-cv-04647-JST-VBK (C.D. Cal. June 23, 2010), ECF No. 1.

Among other allegations, plaintiffs contend that the cooperatives are not legitimate agricultural cooperatives and do not market, process, or sell agricultural commodities; the cooperatives have engaged in predatory conduct; the cooperatives have non-farmer members; the cooperatives have conspired with third parties; and the supply-restriction and price-fixing efforts fall outside the Act's limited purposes.³⁰

As these cases continue to make their way through the courts, it goes without saying that to the extent they produce decisions on the Act's scope, in particular whether production or supply limitations fall within the immunity provided by the Act, these decisions will educate and inform the Division's enforcement efforts.

The Production Restrictions Debate

[D]ecisions on the Act's scope, in particular whether production or supply limitations fall within the immunity provided by the Act . . . will educate and inform the Division's enforcement efforts.

The issue of whether the Capper-Volstead Act immunizes production restrictions between cooperatives and their members is of particular interest. Courts have not provided definitive guidance on this issue, and there are well-reasoned arguments supporting each side. This debate is complex but a focus on some of the most salient points is instructive.

Reasons for Holding that Production and Supply Restrictions Fall Outside Capper-Volstead Immunity. In arguing that the Capper-Volstead Act does not immunize production restrictions, one might start with the text itself. The Act reads that farmers "may act together . . . in collectively processing, preparing for market, handling, and marketing" their agricultural products,³¹ and in all post-production activities that relate to bringing products to market. It does not mention specifically farmers acting collectively in planting their crops, or raising their animals, or in planning those activities. Some have argued that this absence of language suggests a broad construction of permitted activities. On the other hand, principles of statutory construction suggest that where a statute includes an explicit list, items not included in the list should not be read into the statute.³² Moreover, Supreme Court cases "consistently hold that exemptions from the antitrust laws must be construed narrowly,"³³ and the Court has followed this principle in cases interpreting the Act.³⁴

Importantly, the Fisherman's Collective Marketing Act (the FCMA), which focuses on fisherman cooperatives, authorizes fishermen to act together in "preparing for market, processing, handling, and marketing" fish. This is similar to the Capper-Volstead Act but the FCMA goes further to permit fisherman to work together in "catching" and "producing" fish.³⁵ This textual divergence raises a reasonable question as to whether Congress intended to treat cooperatives in the fishing industry differently from those in the agricultural industry.

The Capper-Volstead Act's legislative history also could be read as supporting the argument that the Act does not authorize production restrictions. The legislative history contains statements

³⁰ See also Op. & Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-00230-cr, 27 (D. Vt. Aug. 30, 2010), ECF No. 81 (finding that plaintiffs "have pled their way around Capper-Volstead immunity sufficient to survive a motion to dismiss" by alleging, inter alia, that defendant cooperative does not qualify as a Capper-Volstead entity and has not acted for its members' benefit).

³¹ 7 U.S.C. § 291.

³² See, e.g., *Bates v. United States*, 522 U.S. 23, 29 (1997).

³³ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

³⁴ See *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 822–23 (construing the Capper-Volstead Act as not exempting cooperatives that include even a single non-producing member); *United States v. Borden*, 308 U.S. 188, 204–05 (1939) (refusing to imply an exemption when the Act did not authorize expressly cooperatives to act with non-cooperatives).

³⁵ 15 U.S.C. § 521.

that legislators believed that middlemen were preying on farmers and consumers and that, by giving farmers countervailing power, the Act would lead to increased production—as opposed to production limitations—and therefore, lower prices for consumers. For example, one congressman predicted that cooperatives

will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. The so-called middlemen should not be in a position to demand excessive profits. Our system of marketing should be such as will give to the farmers the greatest possible proportion of the wealth they produce.³⁶

Historically, the Division has taken the position that the Act does not exempt production limits from the antitrust laws. For example, in the 1950s, the Division filed a pair of civil suits against cooperatives that allegedly implemented production limits.³⁷ In addition, in 1968, the Division issued a business review letter that refused to approve a wheat-growers association's proposal to limit its members' production of wheat.³⁸ Then, in the mid-1970s, the Division again challenged production limits instituted by a cooperative, though the Division later dropped its allegations concerning production limitations in order to facilitate appellate resolution of another issue.³⁹ Finally, a 1977 report issued by the Division reviewed the Act's legislative history and found "some evidence that Congress was concerned about the right or ability of cooperatives to restrict the supply of agricultural commodities."⁴⁰

The Federal Trade Commission and U.S. Department of Agriculture publications have advanced similar views. In a 1977 decision, the Federal Trade Commission observed that "there are strong indications [in the legislative history] that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production" and that Congress "reinforced" that interpretation "by adding to the . . . Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Act of 1937," which contains "important procedural safeguards."⁴¹ A Department of Agriculture publication, for its part,

³⁶ 59 CONG. REC. 7852 (1920) (statement of Rep. Morgan). See also 62 CONG. REC. 2058 (1922) (statement of Sen. Capper) ("[F]armers can do something to cut down the spread between the prices they now receive and those paid by consumers. Even though the farmers should keep all of this saving it will stimulate production, thus insuring more adequate supply of necessities."); 59 CONG. REC. 8028 (1920) (statement of Rep. Larson) ("[Cooperatives] will increase production and solve the food problem for our too rapidly increasing city population."); 59 CONG. REC. 8026 (statement of Rep. Towner) ("[T]he only object and purpose of the bill is to provide that when cooperative effort is necessary to facilitate and increase production it might be authorized and protected.").

³⁷ *United States v. Shade Tobacco Growers Agric. Ass'n*, 1954 Trade Cas. (CCH) ¶ 67,751 (D. Conn. 1954) (suit charging that a tobacco-growers cooperative and its members agreed to limit the production of tobacco settled with a consent decree barring such agreements); *United States v. Grower-Shipper Vegetable Ass'n of Cent. Cal.*, No. 30561 (N.D. Cal. 1951), *aff'd per curiam*, 344 U.S. 901 (1952) (government filed suit challenging an agreement among members of lettuce-growers' association to restrict the amount of lettuce produced; the government won a preliminary injunction and defeated a defendant's motion to dismiss on Capper-Volstead grounds, and the case was subsequently dismissed as moot).

³⁸ Letter from Edwin Zimmerman, Ass't Att'y Gen., to Ray Obrecht, Master, Colo. Grange (Oct. 2, 1968) (stating that the Division believes that "the Capper-Volstead antitrust exemption applies only to marketing and not production agreements").

³⁹ *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 819 n.5.

⁴⁰ U.S. DEP'T OF JUSTICE, ANTITRUST IMMUNITIES REPORT, *supra* note 9, at 68. See also *id.* at 68–69 (concluding that "it would not be the act of a rational legislature to give the cooperatives the power to deal with overproduction, a factor which had been demonstrated was not a cause of the crisis it was addressing").

⁴¹ *Cent. Cal. Lettuce Producers*, 90 F.T.C. 18, 62 n.20 (1977).

has stated that “it is not legal for cooperatives to control members’ production. The basic role of cooperatives is to market the available supply in the most effective manner possible, not to limit production.”⁴²

Reasons for Holding that Production and Supply Restrictions Are Immune Under the Capper-Volstead Act. There are also a number of arguments supporting the position that the Capper-Volstead Act allows cooperatives and their members to restrict production. Many point to the Act’s operative language—“processing, preparing for market, handling, and marketing”—and argue that this encompasses the full range of farming activities, from pre-planting, through harvest and processing, to sale. Some reason that “preparing [products] for market” includes determining how much to produce, and that “marketing” includes determining how much to produce for market. Arguments relating to practicality and efficiency in support of production limits are commonly proffered and are the kinds of arguments articulated by private litigants and others in the industry. Some have argued that, as part of “marketing,” cooperatives are allowed to withhold a portion of their members’ output from the market—for example, destroying it or donating it to charity—and that it would be more efficient to permit them to accomplish this directly with production limits. The argument continues that, as a matter of economic efficiency and common sense, it is counterintuitive to permit destruction of crops post-harvest but deny coordination upfront in the planting of those crops because permitting such an outcome results in unnecessary costs, wasted resources, opportunity costs, and negative environmental impacts.

Some also find support for production limits in the Act’s legislative history. There are statements in the legislative history indicating that particular legislators contemplated cooperatives managing the production of their members.⁴³ Additionally, during their debates, members of Congress stated that the Act would treat cooperatives like single corporate entities, allowing them to act in the same fashion as the large corporations farmers faced when they went to sell their products. As Senator Capper himself explained, “[t]he Capper-Volstead bill . . . was designed simply to give the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years.”⁴⁴ These statements support the argument that, because an industrial corporation can decide how much it (or each of its divisions) will produce, Congress must have intended to allow agricultural coop-

⁴² U.S. DEP’T OF AGRIC., RURAL BUS.-COOP. SERV. COOP. INFO. SERV. REPORT 1, § 3, COOPERATIVE BENEFITS & LIMITATIONS 17 (1980, reprinted 1990); *see also* U.S. DEP’T OF AGRIC., AGRIC. COOP. SERV. COOP. INFO. REPORT 38, MANAGING COOPERATIVE ANTITRUST RISK 23–24 (1989) (“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. The conventional belief among cooperative scholars is that this goes beyond the extent of the protection available under the Capper-Volstead Act.”); U.S. DEP’T OF AGRIC., COMMENTS ON THE DEPARTMENT OF JUSTICE REPORT ON MILK MARKETING 16 (1977) (stating that “a cooperative cannot . . . [r]estrict the amount of production of producers”).

⁴³ *See, e.g.*, 62 CONG. REC. 2225 (1922) (statement of Sen. Lenroot) (“If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices, . . . we would see . . . immediately an upward turn toward prosperity. [W]e are justified in enacting this legislation which will enable the farmers of this country to put themselves somewhat nearer an equality of bargaining power and control of output in production that all other industries have today.”); 61 CONG. REC. 1043 (1921) (statement of Rep. Hersey) (“[The Act] enables the producers to act together for their mutual interests in the planting, care, and marketing of agricultural products.”); 60 CONG. REC. 376 (1920) (statement of Sen. Townsend) (“without the right to cooperate in production and disposition of products, the farm will continue to be a very unprofitable, unsuccessful place”).

⁴⁴ 62 CONG. REC. 2058 (1922); *see also* H.R. Rep. No. 67-24, at 2 (1921) (“Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. . . . Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. . . . This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.”).

eratives to determine its members' production volumes. On the other hand, the statute also could be read to allow cooperatives to act as corporations only for the purposes specified in the statute, meaning that common marketing would be permissible but common production schemes may not be. For example, Senator Capper stated that "the cooperative form of organization . . . maintains individuality of production but enables them to unite for marketing purposes."⁴⁵

Some argue that support for production limits can also found in the case law. First, there is at least one case, *Alexander v. National Farmers Organization*, holding that a cooperative may withhold its members' products to negotiate a higher price,⁴⁶ which some claim establishes the broad proposition that the Act authorizes all forms of "supply management." Some may argue in response that the withholding of existing product fits much more comfortably under the rubric "preparing for market, handling, and marketing" than production limits and that the practices can have very different practical economic consequences. Second, *Alexander* could be read as suggesting that cooperatives may limit production: "Co-ops cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by co-ops alone."⁴⁷

Finally, proponents of production limits have cited a pair of government enforcement actions involving the FCMA, which, as described above, is similar to the Capper-Volstead Act for the fishing industry. In one case, the Federal Trade Commission held that the FMCA immunized an agreement among fishermen in a cooperative to refrain from fishing for several weeks while negotiating with buyers, analogizing a fishermen's association to a single corporation and observing that "[t]here is no obligation on the single corporation to produce at capacity."⁴⁸ In another case, the Division entered into a consent decree prohibiting fishermen from agreeing to refrain from fishing while negotiating with buyers, except as members of FCMA associations.⁴⁹ The FCMA, however, is textually distinct from the Capper-Volstead Act in that the FCMA expressly permits fishermen to act together in "catching" and "producing" fish.⁵⁰

Additional arguments on either side of the debate remain. This is an issue that provides an intellectual challenge to lawyers and judges, but, much more importantly, it has great practical consequences for farmers and the agricultural community as a whole. As cases make their way through the court system, the Division will continue to monitor developments closely and evaluate any potential impacts on enforcement of the antitrust laws.

Conclusion

Cooperatives are important to farmers, to rural economies, to our food supply, and consequently, to the economy and this country as a whole. The livelihoods of many farmers, particularly small-

⁴⁵ 62 CONG. REC. 2058 (1922) (statement of Sen. Capper).

⁴⁶ 687 F.2d 1173, 1188 (8th Cir. 1982) (finding that a cooperative's withholding of milk for two weeks was within the scope of the Act's protection).

⁴⁷ *Id.* at 1182.

⁴⁸ Wash. Crab Ass'n, 66 F.T.C. 45 (1964).

⁴⁹ See *Oregon v. Mulkey*, 1997-1 Trade Cas. (CCH) ¶ 71,859 (D. Or. 1997); see also U.S. DEP'T OF AGRIC., *supra* note 5, at 291 ("It is uncontested that, under the rationale of the [majority opinion in *Washington Crab Association*], that a value-added cooperative can, just like its non-cooperative competitors, limit the amount of product it offers for sale. These precedents [*Alexander*, *Washington Crab Association*, and *Mulkey*] suggest that members of a cooperative may voluntarily agree among themselves to limit their production as well.").

⁵⁰ Compare 15 U.S.C. § 521 (providing that fishermen "may act together in associations . . . in collectively catching, producing, preparing for market, processing, handling, and marketing" products), with 7 U.S.C. § 291 (providing that farmers "may act together in associations . . . in collectively processing, preparing for market, handling, and marketing" products).

er farmers, depend on the services that cooperatives provide, and cooperatives are essential in ensuring that food lands on grocery shelves, and ultimately on the tables of American consumers. Cooperatives also provide thousands of jobs, particularly in rural communities. Cooperatives that act within the Capper-Volstead Act's scope are immune from the antitrust laws and will not be prosecuted. Congress does not grant antitrust exemptions lightly, and the congressional decision to shelter certain cooperative activities will be respected. By extension, where Congress chose to impose certain limitations on cooperatives, the Antitrust Division will take all appropriate enforcement actions against activities that exceed those limitations. ●