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SHERMAN SECTION 2 MONOPOLIZATION FOR
AGRICULTURAL MARKETING COOPERATIVES

by

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I. An Overview of Monopolization under Sherman Section 2

Unlawful monopolization under section 2 of the Sherman Act¹ addresses market dominance and exclusionary intent.² According to the Supreme Court in United States v. Grinnell Corporation,³ a person who has unlawfully monopolized in restraint of trade satisfies two tests. First, the person must have monopoly power. Second, the person must have willfully acquired or maintained that power as opposed to achieving it from "growth or development as a consequence of a superior product, business acumen, or historic accident."⁴

The monopoly power element in Grinnell is the power to control prices or to exclude competitors in the relevant market.⁵ The first, traditional, step in evaluating the presence of this power is to define the relevant product and geographic market. The relevant market is the "narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market."⁶ The power to control price or exclude competitors in this market does not, as Sullivan points out, imply that there are two separate standards for determining monopoly power.⁷ Because price and competition are intimately related, "the usual formulation is merely a convenient way to suggest a single test--whether a firm has sufficient power to raise prices, and whether it could, by lowering prices, exclude competitors

from the market."⁸ Accordingly, monopoly power does not require that prices be set at a profit maximizing level or that competition actually be excluded. As the Supreme Court stressed in American Tobacco, the material consideration is whether the firm has the power to do these things.⁹

In addition to proving monopoly power, the plaintiff in a section 2 action must establish that the monopolist has engaged or intended to engage in certain conduct. Specifically, the plaintiff must establish a general exclusionary intent by showing that the alleged monopolist intended or actually acquired or maintained the monopoly power through unlawfully predatory or exclusionary conduct in contrast to doing so with a superior product or as a result of historic accident or through business acumen. Conduct that is exclusionary in purpose or function tends to erect barriers to new firm entry or to deter incumbent firm expansion.¹⁰

In this article, we evaluate Sherman section 2 monopolization for agricultural marketing cooperatives. After restating Grinnell for application to agricultural marketing cooperatives, we consider evidence that may support a finding of monopoly power and exclusionary intent. We then assess the monopolization case law for cooperatives. Here we identify instances where courts have not adequately modified their monopolization analysis for a cooperative and the corresponding implications for liability.

II. Agricultural Marketing Cooperatives and Sherman Section 2 Monopolization

A. The standard

An agricultural marketing cooperative is a business association operating primarily to market farm products for its members.¹¹ Some cooperatives are involved in the first stages of processing and marketing farm commodities.¹² Other cooperatives only represent producers in sales negotiations with buyers, seeking to enhance terms of sale for member-farmers.¹³ In either case, the cooperative is a combination of farmers and is engaged in trade or commerce.

The prospect that a marketing cooperative might represent an unlawful combination under the Sherman Act¹⁴ prompted Congress to pass section 6 of the Clayton Act¹⁵ and later to pass the Capper-Volstead Act of 1922.¹⁶ In National Broiler Marketing Association v. United States,¹⁷ the Supreme Court identified the congressional purpose in passing Capper-Volstead.¹⁸ According to the Court, in Capper-Volstead Congress expressed its concerns with both the nature of production agriculture-- perishability, bulky products, uncertainty, production cycles--and the organization of the markets in which farmers competitively organized farmers as price takers and imperfectly organized buyers with power to control price and nonprice terms of sale.¹⁹ Congress expected that through cooperatives, individual farmers could respond to the factors that might otherwise contribute to lower farm incomes. With Capper-Volstead, eligible cooperatives would

not be subject to the antitrust proscriptions on combinations in restraint of trade.²⁰

Case law on Capper-Volstead has largely focused on the extent of protection Capper-Volstead provides from antitrust charges. In this regard, courts have soundly rejected various claims that the Capper-Volstead Act entirely removes cooperatives from the reach of the antitrust laws. In United States v. Borden²¹ the Supreme Court reversed a district court holding that the only cooperative-related restraints of trade prohibited were those leading to unduly enhanced prices and, for these, the Secretary of Agriculture was to have exclusive jurisdiction.²² The Supreme Court found that the Capper-Volstead authorization for collective action is limited and that the Secretary's responsibility is auxiliary.²³ Faced with similar arguments in Maryland and Virginia Milk Producers Association v. United States,²⁴ the Supreme Court held that section 2 of Capper-Volstead does not give the Secretary of Agriculture exclusive jurisdiction over cooperatives responsible for restraints of trade nor over cooperatives engaged in monopolization.²⁵ And, because Borden made clear that cooperatives are subject to Sherman section 1, the Court reasoned that Congress could not have intended section 1 of Capper-Volstead to exempt cooperatives from Sherman section 2.²⁶ The Court observed that the "sections closely overlap, and the same kinds of predatory practices may show violations of all."²⁷

Besides establishing that Capper-Volstead does not put cooperatives entirely beyond the reach of the antitrust laws, Borden and

Maryland and Virginia demonstrate alternative bases for finding a cooperative is not entitled to any protection. In Borden, the Court ruled that Capper-Volstead does not protect combinations with non-producers, an organizational analysis.²⁸ In Maryland and Virginia the cooperative was validly organized but it had allegedly engaged in activity which, if proved, was beyond what section 1 of Capper-Volstead authorizes.²⁹ Subsequent case law on Capper-Volstead has continued to develop both types of limitations.

As in Borden, one line of case law has addressed the organizational requirements a cooperative must satisfy to be eligible for Capper-Volstead protection. In these cases, courts have evaluated who is a Capper-Volstead person,³⁰ who is a Capper-Volstead agricultural producer,³¹ and which activities must a Capper-Volstead cooperative perform.³² A cooperative is not entitled to protection if it has violated section 1 voting, dividend, or operating requirements or if it is not comprised of business organizations each directly engaged in farm-level production or if it does not undertake any function that might be characterized as being within processing or preparing for market or handling or marketing.³³ A cooperative might also be ineligible for protection if any members are among those whom policy indicates Congress did not intend for Capper-Volstead to protect.³⁴

In a second line of cases, courts have held that a cooperative organizationally compatible with Capper-Volstead may still be ineligible for protection from antitrust charges if it has engaged in activity as a cooperative that goes beyond the scope of the Capper-Volstead

exemption. The classic statement is from Maryland and Virginia where Justice Black observed that the general philosophy of Clayton section 6 and the Capper-Volstead Act is that "individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage--and responsibility--available to businessmen acting through corporations as entities."³⁵ That is, in matters going beyond the Capper-Volstead section 1 requirements for protection from antitrust charges, the cooperative is to have the same opportunities and liabilities as does a proprietary firm. In the context of Sherman section 2 monopolization, the Maryland and Virginia line of case law has attempted to distinguish between the market power and exclusionary activities Capper-Volstead authorizes and when a cooperative has gone so far beyond what Capper-Volstead may allow that it is ineligible for protection and may indeed have violated section 2.³⁶

One possibility, of course, is that Capper-Volstead does not modify application of section 2 to agricultural marketing cooperatives. The district court in Fairdale Farms, Inc. v. Yankee Milk, Inc. (Fairdale I)³⁷ took essentially this view. The court held that a plaintiff alleging that a cooperative has engaged in monopolization has no greater burden than if the plaintiff were charging a proprietary firm with monopolization.³⁸ According to the district court, a cooperative with monopoly power violates section 2 if it willfully acquired this power.³⁹ Presumably, registering new farmer members would be a willful acquisition.⁴⁰ As the district court saw it, while

Capper-Volstead does not proscribe the formation of a cooperative, courts are to draw the line on a cooperative's market power at the point the cooperative acquires monopoly power.⁴¹ Of course, if a cooperative acquires or exercises its power through predatory means, this could also satisfy Grinnell.⁴²

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court holding in Fairdale I.⁴³ The court found that Capper-Volstead modifies Grinnell; a cooperative can undertake some activity willfully to acquire or to maintain monopoly power.⁴⁴ Unlike the district court, the court of appeals could not find anything in section 1 of Capper-Volstead limiting farmers' collective market power to something less than that associated with monopoly power.⁴⁵ Moreover, the court was unwilling to assume responsibility for divining the point at which the collective formation and growth of a cooperative becomes unlawful monopolization.⁴⁶ Limits on a cooperative's monopoly cannot be tied solely to market power acquired or maintained by normal growth or by voluntary registration of new members--willful acts not expressly within a Grinnell exception.⁴⁷ For a cooperative, Capper-Volstead means that unlawfully acquired monopoly power or legitimate monopoly power unlawfully maintained must refer to conduct that is predatory or that stifles or smothers competition.⁴⁸

The Second Circuit's decision in Fairdale I has considerable case law support⁴⁹ and has received broad endorsement. The U.S. Courts of Appeal for the Sixth,⁵⁰ Eighth,⁵¹ Tenth,⁵² and Eleventh⁵³ Circuits have expressed approval of Fairdale I.⁵⁴ Restated for agricultural

marketing cooperatives, the second element in Grinnell has a fourth exception. A plaintiff charging a cooperative with Sherman section 2 monopolization must prove that the cooperative has monopoly power and that the cooperative willfully acquired or maintained this power as opposed to achieving it from growth or development as a consequence of (1) a superior product, (2) business acumen, (3) historic accident, or (4) conduct compatible with what Congress authorized in the Capper-Volstead Act.⁵⁵

Conduct going beyond Capper-Volstead has loosely been referred to as "predatory."⁵⁶ But in "cases construing the Capper-Volstead Act, ["predatory practices"] is intended to distinguish monopolies acquired through anticompetitive practices from lawful accretions of market power willfully created through the voluntary enrollment of members of cooperatives."⁵⁷ Predatory practices are not restricted to "anticompetitive practices without business justification."⁵⁸ "An anticompetitive practice may have economic justification but its use may be taken with unlawful intent and in the desire to achieve an unlawful goal."⁵⁹ Objectionableness in these instances may depend on the cooperative's market power.

As Judge Wyzanski recognized in Cape Cod, an assessment should be made of the cooperative's strength in a particular market and how it achieved that strength. In a monopolization case, "an increasing percentage and a very high percentage of the market may invite much more careful scrutiny than a small percentage."⁶⁰ When a firm with some market power undertakes conduct identical to that by a firm with

considerably more market power, they may not share the same results or motivation. The more dominant firm, by definition, has more influence on the market. Accordingly, "even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act."⁶¹

B. Identifying monopoly power and conduct

1. Market power and agricultural marketing cooperatives

Market power for an agricultural marketing cooperative or for any firm refers to control over price. If a firm has market power, it must lower price to sell more. When firms are atomistically organized, as is usually the case in agricultural production, each firm faces a horizontal demand curve for its output. Individually, a producer has no market power; he is a price taker. One potential avenue to market power is collective action through a cooperative.

The Capper-Volstead modification of Grinnell is relevant for two types of agricultural marketing cooperatives, operating and bargaining cooperatives. In an operating cooperative, producers collectively undertake activities occurring past the farm level. This may involve "product procurement, sorting, preparing for market, storage, sales, transportation, and processing."⁶² The underlying motive for organizing an operating cooperative is to increase farmer returns. The cooperative might accomplish this by earning some of the profits involved in marketing, by organizing or performing marketing functions

more efficiently, by exercising market power over terms of trade, or by ensuring that the producer has an outlet for his product.⁶³ Through a bargaining cooperative, farmers join together to influence their terms of sale with the buyers each farmer would otherwise face on his own.⁶⁴ Sales terms include price or a price determination formula as well as such things as quality standards, grading procedures, or hauling allowances.⁶⁵ Bargaining cooperatives attempt to influence terms of trade in different ways. Some take title to members' production and negotiate sales terms with buyers.⁶⁶ In other bargaining cooperatives, members designate the cooperative as the exclusive bargaining or selling agent for their production.⁶⁷ Some bargaining cooperatives do not negotiate with buyers but gather information and provide members with a forum for determining the common sales terms each will individually require from buyers.⁶⁸

When an operating cooperative assembles or processes farm output, the producer will receive a price reflecting the value of his output and his share of any profits from the marketing activities. Mighell and Jones observe that any long run ability to return higher prices will depend on the cooperative developing a differentiated product with a special brand name and monitoring the quantity it permits to flow into the processed product.⁶⁹ Youde and Helmberger add that this market power is more available to a cooperative handling consumer products since "product identification and differentiation are easier to attain at that level."⁷⁰

In only certain circumstances will a bargaining cooperative have

the potential for improving farmers' price and income, and these circumstances will not be satisfied for all commodities.⁷¹ A principal requirement for a cooperative to raise price above the competitive level will be the cooperative's ability to control output.⁷² Since the cooperative qua cooperative generally only controls the disposition of output among outlets,⁷³ this condition must be satisfied with some other mechanism--especially if there are a large number of producers and production occurs over a broad geographic area.⁷⁴ Hoos points to market orders as one alternative.⁷⁵ Mighell and Jones expect that market power will be restricted to instances where production is narrowly limited as a result of particular climate or soil conditions.⁷⁶ Without control over supply, the potential for price enhancement largely depends on the degree of competition among buyers for producers' output.⁷⁷ As competition among buyers "approaches the limit of perfect competition, the potential for farmer gains erodes away and disappears in the long run."⁷⁸ The potential for long-term gain from bargaining is therefore greatest when producers would otherwise encounter sub-competitive prices associated with monopsony or monopsonistic competition.⁷⁹ In situations of monopsonistic competition, the cooperative's success in raising price towards the competitive level will depend on how jealously buyers guard their market share⁸⁰ and on how well the cooperative can manipulate buyers. The cooperative will be more successful the better it alters or threatens to alter the distribution of producers' output depending on buyer willingness to make price concessions.⁸¹ Doing this will be more

manageable the fewer uses the output has.⁸² Helmlinger and Hoos expect that the greatest gains from bargaining will be in processing fruits and vegetables, sugar beets, and fluid milk because conditions necessary for success are more prevalent with these commodities.⁸³

2. Identifying monopoly power and conduct

a. Monopoly power in the relevant market

That a cooperative has some control over price does not mean that it has monopoly power. The distinction between market power and monopoly power is the degree of control over price. Both the monopolist and the monopolistically competitive firm may perceive that each's demand curve slopes downward and hence to sell more each must charge a lower price. But unlike the monopolistically competitive firm, the monopolist has a substantial "degree of power to control price, to be inefficient, or to exclude competitors."⁸⁴

Monopoly power can be assessed directly and indirectly. Absent evidence of actual control or exclusion, however, the assessment must be indirect. Whether a firm has monopoly power may be evaluated looking at market structure, the firm's conduct, and the firm's performance.

Market share, a structural variable, is a principal indicator of market power in the relevant market.⁸⁵ If a firm cannot control quantity supplied, it cannot control price. Market share is not the only determinant of monopoly power, though. The number of other firms

in the market and the distribution of market shares among these firms influence the significance of a given market share.⁸⁶ A given market share in a market with a number of small rivals may suggest greater power than would the same market share in a market with only one or two other firms. Likewise, a seller with a large market share has no long-run power over price unless there are barriers to new entry or to the expansion of incumbent rival firms. These barriers will be specific to the industry but might include technological or pecuniary economies of scale, large capital requirements, patent rights, a highly differentiated product,⁸⁷ or access to resources such as labor, land, transportation or energy. Finally, a given market share in a contracting industry--where new entrant sales must come at the expense of incumbent firms--suggests greater power over price than would the same share in a rapidly growing industry.

Monopoly power might also be inferred from a firm's conduct or from a firm's performance. To the extent that it would not be effective or practical for a less powerful firm to engage in certain activity, conduct is an indicator of monopoly power.⁸⁸ This may include pricing so as to deter new entry or fringe firm expansion⁸⁹ or threatening to stop buying or selling unless a party modifies its behavior. If a firm is able to undertake certain marketing strategies, this might also support a finding of monopoly power.⁹⁰ From economic theory, monopoly is associated with certain performance. A profit maximizing monopolist will have higher prices, lower outputs, and greater profits relative to performance in an atomistically organized

market. Profit and price levels in relationship to product costs, absent X-inefficiency⁹¹ or strategic pricing, may indicate monopoly power. This evidence will be more convincing if the levels have persisted over time despite changes in supply or demand conditions.⁹² Taken with structural evidence, the conduct and performance indicators may provide sufficient circumstantial evidence to establish that a firm has the substantial power over price necessary to constitute monopoly power.

For an agricultural marketing cooperative, some generally valid indicators of monopoly power may be misleading. This might be particularly the case with evidence of a large market share in the relevant market. Even if an operating or a bargaining cooperative controls the distribution of 100 percent of the raw commodity, it will not necessarily have monopoly power. Economists have shown that a cooperative's potential for controlling price depends on, among other things, its ability to control the quantity supplied by its members and on the market organization of buyers.⁹³

Looking first at an operating cooperative, several cases illustrate the potential for monopoly power for a cooperative controlling the procurement of all supply. The cooperative may have no control over quantity supplied, accepting all production current or future members offer--the open-membership (OM) case--or it may affect supply by restricting membership if doing so increases unit returns to remaining members--the restricted-membership (RM) case. For the OM or RM cooperative engaging in, say, processing, it may sell in an

atomistically organized market for both buyers and sellers, it may be a monopolist selling to atomistically organized buyers, or it may be a monopolist selling to a monopsonist.⁹⁴

When a profit maximizing cooperative controlling all procurement in an input market sells in an atomistically organized market for both sellers and buyers, theory indicates that the long-run price and output solution is the perfectly competitive solution. The cooperative has no market power despite controlling all procurement in the input market. Relative to the equally efficient proprietary monopsonist, the cooperative will pay farmers more and process more raw product. Since marginal revenue equals price, this result holds regardless of supply control.⁹⁵ A situation resembling monopsony-atomistic sales occurs when the basic agricultural commodity is sufficiently bulky or perishable as to limit the area of procurement and barriers to entry are high enough to permit a single processor.⁹⁶ Once processed, however, the product may be sold in a national market. Examples might include canned fruits and vegetables and manufactured milk.⁹⁷

When a monopsonist-monopolist cooperative sells to atomistically organized buyers, the presence of market power depends on the ability to control supply. Because it is a quantity taker, the OM cooperative has no market power despite controlling all procurement and distribution. Any price enhancement above the competitive level will call forth excess supply. Relative to the equally efficient proprietary monopsonist-monopolist, the OM cooperative gives producers a higher return, charges buyers less, and processes more raw product.⁹⁸ In

contrast, the RM cooperative has an incentive to restrict output to exploit its monopoly status. Relative to the proprietary firm, the RM cooperative may pay producers a higher price, but unlike the OM cooperative will charge buyers more and will process less. This cooperative has an incentive to exercise market power.⁹⁹ Situations approaching the general case of a monopsonist-monopolist selling to many buyers might include a cooperative bottling fluid milk and selling to buyers in a market insulated from competition as a result of distance or sanitary requirements. It could also refer to the handler of a horticultural specialty that sells directly to numerous buyers.¹⁰⁰

In the final case, a monopsonist-monopolist cooperative sells to a monopsonist. The price-output solution under this bilateral monopoly is not unique. Jesse and Johnson show that the solution depends on the relative bargaining strength of the respective parties.¹⁰¹ In the OM case, if the cooperative dominates it will select a level of processed product output exceeding the maximum output if the cooperative were a private firm. If the monopsonist dominates, output will equal the maximum private firm output. Regardless of dominance, the RM case may lead to a processed product output less than the minimum for a private processor. Examples approaching bilateral monopoly might include a dairy cooperative that assembles members' raw milk for delivery and sale to a fluid milk bottler having a large market share in an isolated market.¹⁰²

These examples reveal that an OM operating cooperative tends to yield an output consistent with the maximum associated with the market

structure it faces as a seller. Relative to the private firm, the cooperative as a quantity taker tends to process more and return a higher price to producers. Any attempt by the cooperative to exploit a downward sloping demand curve would fail. Members would respond to a higher price by supplying an enhanced level of output inconsistent with demand at the higher price.

The conclusion that it is unlikely for an OM cooperative to possess long run market power let alone monopoly power needs some qualification. The conclusion depends on the additional assumption that the cooperative is not able otherwise to control member production decisions or to control the quantity of the processed output that is distributed. Jesse and Johnson observe that the OM cooperative may still be able to control the quantity supplied to a market.¹⁰³ The cooperative might use long-term marketing agreements with members. With these, members agree to market a specified proportion of their production through the cooperative even though returns for short periods may not be competitive. Alternatively, the cooperative may impose stringent quality requirements on members' production. The cooperative may also be able to control price by participating in a federal market order having provisions that authorize price discrimination--that is, allocating different quantities to markets having different elasticities of demand.¹⁰⁴ The cooperative will enhance profits if it allocates supply between markets to keep marginal revenue from each market the same. Finally, the cooperative may influence production decisions if it does not return higher output prices to

members. If the cooperative retains any increased revenues for expansion purposes or if higher returns are used to pay higher costs from less efficient operations or to pay higher managerial salaries, members will not base their production decisions on the higher prices. In this way, the operating cooperative could realize supra-competitive prices without encouraging its members to expand production.

The market power of a bargaining cooperative likewise depends on the proportion of supply the cooperative controls and the competitive organization of buyers. In contrast to the operating cooperative cases, however, the bargaining cooperative is only concerned with sales terms. Focusing just on price terms,¹⁰⁵ the cooperative bargaining over all output can face a spectrum of market structures from atomistically organized buyers to a monopsonist. Helmberger and Hoos conclude that when buyers are atomistically organized long-run profit maximization means producers will not use a cooperative that does not control quantity.¹⁰⁶ When the bargaining cooperative manages a large share of production available for distribution and faces a monopsonist buyer, the price-output solution is not unique. As with the operating cooperative, the solution depends on relative bargaining power and ability to limit the quantity made available to the market. If the monopsonist is dominant, the solution will be the same as under pure monopsony. If the cooperative is dominant and there is no control over supply, the solution will correspond to that under perfect competition. If the dominant cooperative controls supply, however, it may be able to enhance price above the competitive level.¹⁰⁷

Mindful of the qualifications on how an OM cooperative might still influence quantity supplied or quantity allocated to a given market, the preceding discussion reveals that market share may be a misleading indicator of control over price. Market power, let alone monopoly power, is not to be expected for the OM operating cooperative even if it controls all procurement and distribution. The same result holds if the bargaining cooperative controls the disposition of all supply. In contrast, though, there is an incentive in certain instances for the RM cooperative to manipulate output to achieve a higher price for members. Since it is able to control supply, the monopsonist profit-maximizing RM cooperative may try to exercise market power whenever the demand curve it faces is downward sloping.

As noted previously, monopoly power may be inferred from price as well as from structure or conduct.¹⁰⁸ A monopoly price is one that is high relative to costs and persists over time despite changes in supply or demand. Because a dominant firm may engage in strategic pricing or long-run profit maximization or because it may have higher costs, price-cost margins may be of dubious value as an indicator of monopoly power. But unlike a proprietary firm where ownership is separate from patronage, a cooperative seeking Capper-Volstead protection must conduct at least one-half of its business with its owners.¹⁰⁹ If, and to the extent, this involvement puts further pressure on management to maximize revenues by manipulating quantity, price becomes an important indicator of the degree of the cooperative's market power. A relevant issue with respect to monopoly power is how to identify a monopoly

price for a cooperative.

The basic guideline on what is a monopoly price comes straight from the case law on monopolization. In Maryland and Virginia, the majority specified that an agricultural cooperative is to have the same advantages and responsibilities as do businessmen acting through corporate entities.¹¹⁰ The characteristics of a monopoly price for a cooperative are accordingly the characteristics of a monopoly price a proprietary firm charges.¹¹¹ If the cooperative maximizes revenues, this price will likely be high relative to costs or to comparable products and will persist over the long run.¹¹²

b. Exclusionary conduct

If a cooperative is shown to have monopoly power, the plaintiff must further establish that the cooperative has engaged or intended to engage in exclusionary conduct. Evidence of objectionable intent or conduct is necessary to distinguish intent consistent with competitive processes from exclusionary intent. The evidence may provide conclusive, presumptive, or supportive proof of the requisite general exclusionary intent. An analysis of exclusionary conduct is not wholly independent from a finding of monopoly power. The conduct of firms with monopoly power is more open to scrutiny than the conduct of firms with relatively less market power.¹¹³ And some decisions indicate that exclusionary conduct must reflect the use of monopoly power.¹¹⁴ Exclusionary conduct might include merger, marketing strategies

designed to tie up input supplies or sales outlets, advertising-induced product differentiation, and certainly predation.

Sullivan refers generally to predatory conduct by defining it as "conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively."¹¹⁵ Also according to Sullivan, this conduct will have two identifying features. First, "there will be something odd, something jarring or unnatural seeming about it. It will not strike the informed observer as normal business conduct, as honestly industrial."¹¹⁶ Second, "it will be aimed at a target, at an identifiable competitor or potential competitor or an identifiable group of them."¹¹⁷

Recent scholarship has focused on legal-economic rules courts can use to identify predatory pricing designed to discipline or exclude rivals. Areeda and Turner associate predatory pricing with eliminating equally efficient rivals by selling at nonremunerative prices.¹¹⁸ Under their rule, price less than short-run average variable cost is presumptive evidence of predation.¹¹⁹ Scherer expresses a basic suspicion of the Areeda-Turner short-run price-cost rule. According to him, the rule is wrong and may lead to economically unsound decisions.¹²⁰ Appropriate analysis of pricing conduct requires assessing the "relative cost positions of the monopolist and fringe firms, the scale of entry required to secure minimum costs, whether fringe firms

are driven out entirely or merely suppressed, whether the monopolist expands its output to replace the output of excluded rivals or restricts supply again when the rivals withdraw, and whether any long-run compensatory expansion by the monopolist entails investment in scale-embodied new plant."¹²¹ Despite these concerns, other commentators and courts¹²² generally accept the Areeda-Turner formulation as a rule for identifying predatory pricing. As the rule, though, there is considerable disagreement, especially among commentators.¹²³ Mueller summarizes the recent scholarship, concluding that price above average variable cost and even average total cost can be evidence of predation when accompanied with further proof of a design to prey upon incumbent firms or to exclude potential rivals.¹²⁴ Critical to this analysis will be market structure and the alleged predator's market or extra-market resources and economic or noneconomic evidence of exclusionary conduct or intent.¹²⁵

C. Case law evidence of Sherman section 2 monopolization

Case law lends support to the Helmberger and Hoos observation that market power is likely, if at all, with cooperatives dealing in only certain commodities.¹²⁶ The application of section 2 monopoly to agricultural marketing cooperatives has largely involved fluid milk and Arizona-California citrus. In this section, we review the principal section 2 cases, including some where a conspiracy or an attempt to monopolize was charged.¹²⁷ Cases are presented in the context of

Grinnell and essentially in chronological order. While we recognize that case law on section 2 monopolization is not static, our purpose is to identify the evidence courts have found persuasive or unpersuasive with respect to monopoly power and exclusionary intent and how this has changed over time. With some exceptions, it will be seen that the decisions do not extensively analyze monopoly power. And, until some of the most recent cases, the courts have tended to require evidence of predatory conduct to satisfy the exclusionary conduct requirement.

Although one of the first cases to deal with section 2 made a blanket association between market share and market dominance, it did not confine the jury to clearly predatory conduct in order to find unlawful monopoly. In Cape Cod Food Products v. National Cranberry Association,¹²⁸ Judge Wyzanski advised the jury that monopolizing under Sherman section 2 means acquiring a dominant position in a relevant market "so as to exclude actual or potential competition."¹²⁹ The court did not ask the jury to consider whether the defendant cooperative had such a dominant position, however. Instead, the court indicated that a cooperative with a large market share is in a dominant position but this is only unlawful if it achieved this through a prohibited restraint of trade or through a predatory practice or through the bad faith use of otherwise legitimate devices.¹³⁰ The court instructed the jury that it would be prohibited monopolization if "a group of persons used their power to lend money and their power to foreclose on loans, not with the intent of forwarding their banking or credit or like interests, but with the purpose of stifling actual or

potential competition."¹³¹

As in Cape Cod, the Supreme Court recognized in Maryland and Virginia that "lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act."¹³² Addressing alleged attempt and monopolization charges, the Court observed that the cooperative controlled 86 percent of the milk purchased by all dealers in the Washington, D.C. metropolitan area.¹³³ The Court did not assess whether this was the relevant market for monopoly power. Instead the Court stressed that if on remand the Government proved its conduct allegations this would clearly establish that the cooperative had violated section 2.¹³⁴ The alleged conduct included excluding, eliminating, and attempting to eliminate milk producers and non-affiliated producer associations by interfering with non-member truck shipments, inducing a dairy to switch its non-Association members' milk to another outlet, boycotting a feed supplier which also ran a dairy in order to compel purchases from the Association, and using a dairy's indebtedness to the Association to force it to buy Association milk.¹³⁵

Bergjans Farm Dairy Company v. Sanitary Milk Producers¹³⁶ involved an alleged attempt to monopolize milk processing. The defendant cooperative's power in the distribution of raw milk was relevant because it was alleged that it used this power to further its designs on controlling milk processing.¹³⁷ The court found that in the St. Louis market order area the cooperative controlled the distribution of 55 to 60 percent of the raw milk.¹³⁸ The district court found that the

cooperative had monopoly or near monopoly power as evidenced by its market share, its ability to raise funds in a short time by withholding partial payment to members, its bargaining power with financial institutions for non-secured loans, and its dual position as a raw milk supplier and a processor.¹³⁹ The court further found that while the cooperative had lawfully obtained its power in raw milk distribution,¹⁴⁰ it had used this power unlawfully to attempt to monopolize milk processing. The objectionable conduct included¹⁴¹ driving down the wholesale price for milk, selling milk at prices below cost, deceptive bookkeeping, using revenues from higher prices in certain areas to subsidize lower prices in areas where the cooperative sought to control competition, cutting prices and later raising them after eliminating a competitor, conspiring with retailers to fix resale prices and giving them secret rebates, and threatening processors with cutting off their access to raw milk.¹⁴²

In North Texas Producers Association v. Metzger Dairies, Inc.,¹⁴³ a jury found that either the defendant cooperative had monopolized or had attempted to monopolize raw milk marketing in the Dallas-Fort Worth area.¹⁴⁴ On appeal, the Fifth Circuit did not expressly examine market power or the presence of monopoly power in a relevant market. The court simply indicated that the cooperative supplied 85 to 90 percent of the raw milk in the Dallas-Fort Worth area.¹⁴⁵ Moreover, the cooperative had successfully imposed a thirty cent per hundred-weight increase in the price of milk to processors.¹⁴⁶ In determining that there was sufficient evidence for the jury to find for a plaintiff

processor, the court primarily considered the cooperative's activities toward the plaintiff.¹⁴⁷ The court noted that the cooperative had attempted to impose various conditions for sales to the processor and, when the processor refused to comply with the conditions, the cooperative tried to disrupt its access to alternative sources, to buy the processor for the purpose of then controlling price, and there was evidence that the cooperative instigated a boycott of the processor's milk.¹⁴⁸

The alleged section 2 violation in Otto Milk Company v. United Dairy Farmers Cooperative Association,¹⁴⁹ was "endeavoring to monopolize the marketing of milk" in an area of southwestern Pennsylvania.¹⁵⁰ The Third Circuit did not expressly indicate the relevant product but it apparently was raw milk for fluid consumption. Nor did the court dispute that there were alternative sources of raw milk.¹⁵¹ The court affirmed a district court finding that the defendant cooperative violated Sherman section 2 based on evidence of the cooperative's response to the plaintiff. Specifically, when the plaintiff-processor refused to drop its supplier in favor of the defendant, the defendant picketed retailers selling the plaintiff's milk and urged buyers to boycott the plaintiff.¹⁵²

The plaintiffs in Knuth v. Erie-Crawford Dairy Cooperative Association¹⁵³ were milk producers in Pennsylvania furnishing milk under contract to the defendant cooperative. The plaintiffs alleged that the cooperative conspired with processors to restrain trade in and to monopolize the distribution of raw milk.¹⁵⁴ The district court

dismissed the action for failure to state a claim. The Third Circuit reversed, finding that the plaintiffs had sufficiently alleged a violation of Sherman sections 1 and 2.¹⁵⁵ The alleged conduct included a conspiracy to fix the price of cheaper milk shipped into Pennsylvania by giving processors rebates for purchasing milk produced in Pennsylvania. It also included manipulating milk shipments to circumvent operation of a Pennsylvania minimum price schedule for milk produced in Pennsylvania.¹⁵⁶

The first alleged monopolization case specifically to consider monopoly power and conduct came on the heels of Grinnell in Case-Swayne Co., Inc. v. Sunkist Growers, Inc.¹⁵⁷ in 1966.¹⁵⁸ In that case, the Ninth Circuit discussed market power in alternative relevant markets. In reviewing the basis for the district court's grant of Sunkist's motion for a directed verdict, the court found that there was sufficient evidence for the jury to determine that the relevant market was product oranges grown in California and Arizona.¹⁵⁹ Sunkist's share of this market was about 67 percent and this together with evidence of Sunkist's ability to control by-product price convinced the court that there was sufficient evidence for a jury to have found that Sunkist had monopoly power.¹⁶⁰ On the conduct element of Grinnell, the Ninth Circuit observed that while individual instances of the alleged misconduct might be insufficient to establish the wrongful use of monopoly power, the jury must look at the evidence as a whole.¹⁶¹ Seen this way, the court found that the plaintiff had established a prima facie case for the wrongful use of monopoly power and held that the

district court erred in granting the motion for a directed verdict.¹⁶² The alleged misconduct included Sunkist's admitted purpose of controlling all the oranges it could and utilizing them in its own manufacturing facilities, preventing a dealer from fulfilling a commitment to sell oranges to the plaintiff, policing the Sunkist system and imposing sanctions on members selling fruit contrary to contract provisions with Sunkist, manipulating price on fruit and juice, and using consignment contracts and low bidding to secure a Government contract.¹⁶³

Nine years after Case-Swayne, the Ninth Circuit decided another alleged monopolization case involving Sunkist. In Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.,¹⁶⁴ an association of fresh fruit exporters charged Sunkist with monopolizing oranges grown in Arizona and California for export to Hong Kong. On appeal from a jury verdict for the plaintiff, the Ninth Circuit evaluated the evidence before the jury on Sunkist's power in the relevant market and the asserted acts of monopolization. The court found that Sunkist had used its lawful dominance over the distribution of California-Arizona oranges¹⁶⁵ to secure 70 percent of the Hong Kong market within six months of entering that market directly.¹⁶⁶ Over the relevant time period, Sunkist's share of this market ranged from 45 to 70 percent.¹⁶⁷ The court recognized that Sunkist's share was less than had been required in some monopolization decisions,¹⁶⁸ but noted that while market share is perhaps the most important factor in gauging monopoly power it "does not alone determine the presence or absence of

monopoly power."¹⁶⁹ Instead of considering Sunkist's ability to control price, though, the court looked solely at the relative size and change in market shares after Sunkist's entry. Since no competitor had controlled more than 18 percent of the market prior to Sunkist's entry and none controlled more than 12 percent after Sunkist's entry, the court was convinced that with its control over initial distribution Sunkist had monopoly power.¹⁷⁰ Turning to whether there was sufficient evidence of acts of monopolization, the court found that the jury was justified in finding that Sunkist had engaged in monopolization.¹⁷¹ Among the acts were Sunkist's attempts to restrict the supply of oranges available to the plaintiffs, its attempts to divert fruit from the plaintiffs for direct sale to Hong Kong, fraudulently persuading plaintiffs to surrender lists on Hong Kong customers and then giving these lists to Sunkist's exclusive sales agent in Hong Kong, and demanding shipping privileges for export operations exceeding its market share and thereby denying shipping space to rivals.¹⁷²

In five decisions since Fairdale I, courts have applied Grinnell with varying degrees of thoroughness. Despite expectations to the contrary in Fairdale I and regardless of its correctness, Fairdale II¹⁷³ is an inartful treatment of Grinnell. On appeal, the Second Circuit affirmed the district court decision granting the cooperative's motion on remand for summary judgment based on an application of the principles from Fairdale I.¹⁷⁴ Rather than beginning with an assessment of monopoly power in a relevant market, however, the court leaped to an assessment of "predatory" acts independent of any relation

to the cooperative's market power or to one another. At no point in Fairdale I or Fairdale II is there an analysis of market power. Nor is there an evaluation of a relevant market or of conduct or performance as evidence of monopoly power.¹⁷⁵ The court was solely interested in whether the evidence satisfied the threshold for unlawful acts. The first of these was the plaintiff's allegation that the cooperative set so high a price on milk for sale to processors that this constituted a predatory policy. The Second Circuit said this could not stifle competition with other cooperatives or farmers. And because the plaintiff had alleged it was predatory with respect to consumers, the court did not consider the impact on buyers.¹⁷⁶ The court likewise found that setting different premiums in different milk marketing areas was not predatory; the prices were not below cost¹⁷⁷ and prices reflected varying degrees of bargaining power.¹⁷⁸ Finally, the Second Circuit found that since the cooperative did not control all supplies of raw milk it could refuse to deal with those who would not meet its sales terms. Hence its refusal to deal with the plaintiff was not predatory.¹⁷⁹ After looking at the acts individually and independently of market power, Second Circuit found none was a "predatory practice."¹⁸⁰

A clear misreading of Fairdale I and a misapplication of Grinnell occurred in GVF Cannery, Inc. v. California Tomato Growers Association.¹⁸¹ The district court in that case observed that Fairdale I modified the application of Grinnell to cases involving a cooperative.¹⁸² Without considering monopoly power in any relevant market,

though, the court found for the cooperative on a monopolization and an attempt claim because there was no allegation of predatory conduct. That is, there was no allegation of picketing, boycotts, coercion, coerced membership, price discrimination, or secret rebates.¹⁸³ The court did not consider whether, in the context of the relevant degree of market power, less egregious conduct could provide evidence of exclusionary intent.

Three decisions involving monopolization in the supply of raw milk followed Fairdale I. In Kinnett Dairies, Inc. v. Dairymen, Inc.,¹⁸⁴ a dairy processor alleged that the cooperative (Dairymen, Inc.) acting alone and with others had monopolized the supply of raw Grade A milk in the Southeast.¹⁸⁵ The district court took a two-pronged approach in its analysis. First the court assumed that even if the cooperative had monopoly power this was compatible with Capper-Volstead. Hence, if there were no "predatory practices" the section 2 claim would fail. In this regard, the district court evaluated the various activities Dairymen, Inc. undertook. The court began by observing what it would generally be lawful for the cooperative to do. By fair and legitimate means, Dairymen, Inc. could recruit as many farmer members as there were. As agent for its members the cooperative could collect milk at member farms, test it, haul it, process it, and sell it at a price the cooperative fixed. So long as Dairymen, Inc. did not control all supply, it could refuse to sell to one or more customers on reasonable terms.¹⁸⁶ The cooperative could also allocate territories for the sale of different members' milk. The cooperative could join with other

cooperatives satisfying the basic Capper-Volstead requirements for protection from antitrust charges or it could become a member of a cooperative having only cooperatives as members.¹⁸⁷ And it was reasonable for the cooperative to have one-year written supply contracts with members.¹⁸⁸ The alleged predatory conduct the court next reviewed included Dairymen, Inc. unilaterally announcing non-negotiable premium prices, cutting off the plaintiff's profitable hauling operation, cutting off customers who tried to substitute part of their purchases from the cooperative with alternative sources, warding off a potential competitor by cutting off or threatening to cut off a buyer's supply, insisting on committed volume contracts with processors, and cutting off the plaintiff's milk supply and then threatening not to deal with the plaintiff or to sell only at supplemental prices.¹⁸⁹ Assessing these acts alone and in conjunction, the court found that they neither stifled competition nor were they predatory in any sense of the word.¹⁹⁰

The second prong to the court's analysis was to consider, assuming the alleged acts were indeed "predatory" under section 2 so that Dairymen, Inc. was not entitled to Capper-Volstead protection, whether Dairymen, Inc. had monopoly power. Here the court considered the relevant market and the cooperative's power in this market. The court determined that the relevant product was raw Grade A milk and that the geographic market included Georgia and parts of 12 surrounding states.¹⁹¹ The cooperative's share in this market was less than 30.2 percent during the relevant time period.¹⁹² Without explaining why but

apparently on the basis of the low market share, the court concluded that at no time did the cooperative have the power to control prices or to exclude competition on its own or in combination with others.¹⁹³

For this reason, even if the cooperative was not entitled to Capper-Volstead treatment, the cooperative had not engaged in unlawful monopolization and judgment was accordingly to be entered in its favor.¹⁹⁴

Regardless of the apparent thoroughness of the district court decision, the court avoided the substance of the plaintiff's allegations. The plaintiff conceded that the Dairymen, Inc. conduct did not satisfy any traditional notion of predation.¹⁹⁵ Instead, the plaintiff contended that the cooperative had engaged in monopolization through its involvement in a network of arrangements with other cooperatives supplying milk in the relevant market.¹⁹⁶ The court never expressly assessed whether Dairymen, Inc. had monopoly power in combination with others or its conduct in the context of this potentially enhanced market power.¹⁹⁷

Unlike Kinnett, the Eighth Circuit in Alexander v. National Farmers Organization¹⁹⁸ expressly considered the various arrangements among cooperatives that might support a finding of monopoly power.¹⁹⁹ On a review of the district court record, the court found that the district court had erred in holding that the National Farmers Organization (NFO) had not sufficiently proved that the relevant product was Grade A milk.²⁰⁰ The court was also convinced that the defendant cooperatives were major marketers of milk produced in the Midwest,

having 70 to 90 percent of all milk pooled in various of the major federal order markets at issue and controlling over 85 percent of Grade A milk in a number of strategic metropolitan markets.²⁰¹ But the court was uncertain as to "monopoly power in a properly defined market or submarkets."²⁰² Hence the court found that it was not clear error for the district court to dismiss the monopolization claim for lack of monopoly power.²⁰³ The Eighth Circuit did find, though, that the district court erred in holding that the defendant cooperatives had not conspired to monopolize. The alleged conduct the court found to demonstrate an intent to eliminate competition in general and NFO in particular²⁰⁴ included attempting to block NFO from qualifying to market milk in various federal market orders;²⁰⁵ coercing processor buyers to stop purchasing from suppliers not affiliated with the cooperatives, doing so by short shipping, making late deliveries, soliciting the buyer's customers and offering to sell processed milk at close to the buyer's cost of production; engaging in discriminatory pricing between buyers to force an uncooperative buyer away from NFO; threatening an NFO supplied processor with litigation and other harrassment; terminating members and haulers; making certain acquisitions and mergers; and destroying relevant evidence.²⁰⁶ Based on its findings, the court held that the district court erred in holding for the defendant cooperatives.²⁰⁷

The preceding discussion of case law evidence of section 2 violations reveals certain categories of cases. There are several cases where the court only evaluated an attempt or a conspiracy to monopolize

claim. The conduct needed in these cases must demonstrate a specific exclusionary intent.²⁰⁸ Included here are Bergjans Farms (below-cost pricing, secret rebates, coercion), Otto Milk (picketing, boycott), and Knuth (price discrimination). There are other cases where the court's discussion does not make clear whether it analyzed an attempt or a monopolization claim but it would appear to have been the former. Included here are Maryland and Virginia (boycott, eliminating competitors) and North Texas Producers (secret rebates, price discrimination). There are also several cases where monopolization was clearly at issue. In some of these, the court casually observed that the cooperative had a large market share. It would then indicate that since a cooperative is entitled to lawfully obtained monopoly power, alleged misconduct is the key to a violation. Included here are Cape Cod, Fairdale II, and GVF Cannery. Finally, there are cases where the court followed the Grinnell two-part analysis in assessing the monopolization claim. These cases view market share as the basic indicator of market power. They do not require egregiously predatory conduct to establish a general exclusionary intent. Included here are Case-Swayne,²⁰⁹ Pacific Coast Export, Kinnett Dairies, and Alexander.

A pervasive tendency throughout the section 2 cases is to equate monopoly power with market share. As noted, in some decisions courts indicate that if a cooperative has monopoly power this is compatible with Capper-Volstead, hence the only relevant inquiry is with respect to monopoly conduct. Absent monopoly conduct, there is no section 2 violation. But looking at conduct independently of market power means

these courts, as in GVF Cannery, are more inclined to look for predatory conduct evincing the specific intent necessary for attempt claims and sufficient but not necessary for monopolization claims. This approach tends to extend to cooperatives an immunity that goes beyond Capper-Volstead. The Fairdale II and GVF Cannery approaches go the other way. The cavalier use of market share as evidence of monopoly power would seem to expose cooperatives to an enhanced likelihood of section 2 liability.²¹⁰ And even in cases where courts evaluated market share in a clearly specified relevant market, there was still little if any scrutiny of market share as a valid indicator of market power. That is, the decisions do not consider the ability to control supply. Nor do they often assess market share relative to other firms' shares, whether control was shared through marketing agreements, or the presence of barriers to entry or incumbent firm expansion. Only very rarely do the decisions expressly review conduct or performance indicators of monopoly power.

III. Conclusion

The Capper-Volstead authorization for collective action among agricultural producers modifies the application of Grinnell to agricultural marketing cooperatives. A plaintiff charging a cooperative with unlawful monopoly under Sherman section 2 must first establish that the cooperative has monopoly power. The plaintiff must further establish that the cooperative willfully acquired or maintained this power as

opposed to achieving it from growth or development as a consequence of (1) a superior product, (2) business acumen, (3) historic accident, or (4) conduct compatible with what Congress authorized in section 1 of the Capper-Volstead Act.

Monopoly power within a relevant product and geographic market depends on more than a high market share. Economic theory indicates that market share is relevant if the cooperative can control supply with restricted membership agreements, long-term supply contracts, quality restrictions, price discrimination, dumping, or by failing to return higher revenues to producers. If the cooperative can influence supply, a high market share is more meaningful when it is high relative to the combined market share of the cooperative and its leading rivals, when the cooperative is able to enhance its control through marketing agreements with other cooperatives, and when there are substantial barriers to entry or incumbent firm expansion in the form of technological or pecuniary economies of scale, capital requirements, patents, access to production resources, advertising, or a differentiated product.

If the finder of fact determines that there is monopoly power, it must consider whether the proffered intent or conduct evidence demonstrates the general exclusionary intent that is outside the scope of the acceptable conduct under the restated version of Grinnell. Sufficient exclusionary evidence will be clearly predatory acts: picketing, boycotts, coercion, secret rebates, sabotage, and pricing below average variable cost. Other evidence satisfies the intent

standard as well. Exclusionary conduct, looked at as a whole and with or without evidence of price greater than average variable cost, may include unreasonably tying up supply, interfering with producers', rivals', or buyers' access to alternative outlets or sources of supply, undermining their ability to sell, exploiting their vulnerability to the cooperative, or discriminating against certain members in a given class of producers, rivals, or buyers. As indicated in Dairymen, Inc., this conduct may have had a business justification but, viewed as a whole, it was undertaken with the intent to achieve or maintain a monopoly position.

Notes

1. 15 U.S.C. § 2 (1976).
2. Section 2 also proscribes attempts and combinations or conspiracies to monopolize any part of trade or commerce. Id.
3. United States v. Grinnell Corp., 384 U.S. 563 (1966).
4. Id. at 570-71.
5. Id. at 571.
6. L. Sullivan, Handbook of the Law of Antitrust at 41 (1977) [hereinafter cited as Sullivan].
7. Id. at 76-77.
8. Id.
9. American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).
10. Sullivan, supra note 6, at 99-101. Sullivan points out that this is the modern test of exclusionary conduct, deriving from Judge Wyzanski's interpretation of Alcoa in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).
11. Agricultural Cooperative Service, Farmer Cooperative Statistics, 1982 2 (U.S.D.A., Cooperative Info. Rep. No. 1 sec. 27, 1984).
12. These are referred to as operating cooperatives. Knutson, "What is a Producer," in Proceedings of the National Symposium on Cooperatives and the Law 142, 143 (University of Wisconsin Center for Cooperatives 1974) [hereinafter cited as Knutson].
13. These are referred to as bargaining cooperatives.

14. For early cases against agricultural marketing cooperatives proceeding on a Sherman Act theory, see *Burns v. Wray Farmer's Grain Co.*, 65 Colo. 425, 176 P. 407 (1918) (holding unlawful an agreement among farmer-stockholders in a grain cooperative not to sell their products to competitors of the cooperative); *Reeves v. Decorah Farmers' Cooperative Society*, 160 Iowa 194, 140 N.W. 844 (1913) (holding unlawful an agreement among member hog producers to sell their marketable stock only to the cooperative).

15. 15 U.S.C. § 17 (1976).

The House and Senate Reports on section 6, H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914), S. Rep. No. 698, 63d Cong., 2d Sess. (1914), evidence Congress' intent to remove all doubt as to the propriety of the existence of the agricultural associations meeting statutory requirements and to prevent the courts from using the antitrust laws to interfere with cooperative operations or force their dissolution. See Antitrust, "Agricultural Cooperatives--The Clayton Act and the Capper-Volstead Act Immunize the Concerted Price Bargaining of Two Agricultural Cooperatives from Antitrust Liability," 53 Tex. L. Rev. 840, 841-42 (1975).

16. 7 U.S.C. §§ 291-92 (1976).

Capper-Volstead proponents represented the Act as designed to give farmers a fair opportunity to respond to business conditions by combining together to equalize the disparity in the market power between themselves acting singly and corporate middlemen, being able to do so without fear of antitrust prosecution. H.R. Rep. No. 24, 67th Cong.,

1st Sess. (1921).

The discussion here will be in terms of the Capper-Volstead Act although section 6 of the Clayton Act is also relevant. The major difference between the two statutes is in terms of who is protected. Section 6 provides for a limited antitrust exemption for agricultural cooperatives not having capital stock. Capper-Volstead provides for limited antitrust protection regardless of whether the cooperative has capital stock. Though not synonymous, the two are treated similarly with respect to what are legitimate cooperative activities. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Coop.*, 413 F. Supp. 984, 991 (N.D. Cal. 1976).

17. 436 U.S. 816 (1978).

18. This section relies extensively on Paterson "Agricultural Marketing Cooperatives and Section 1 of the Capper-Volstead Act: Conditioning (Limited) Antitrust Immunity on Capper-Volstead Policy" (N.C. 117 Working Paper #84) [hereinafter cited as Paterson].

19. 436 U.S. at 824-27.

20. To be eligible for Capper-Volstead protection from antitrust charges, a cooperative must satisfy section 1 of the Capper-Volstead Act, 7 U.S.C. § 291 (1976). Section 1 provides that

[p]ersons 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.

21. 308 U.S. 188 (1939).

22. Id. at 203-204.

Section 2 of Capper-Volstead, 7 U.S.C. § 292 (1976), provides in part that

"[i]f upon [specified notice and hearing] ... the Secretary ... 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 ... an order ... directing such

association to cease and desist from monopolization or restraint of trade.

The cooperative's argument was that the Capper-Volstead section 2 provision for Secretary action on restraints of trade leading to unduly enhanced prices evidenced Congress' intent that the authority be exclusive. 308 U.S. at 205.

23. 308 U.S. at 206.

24. 362 U.S. 458 (1960).

25. 362 U.S. at 462-63.

Sherman section 2 monopolization was not charged in Borden.

26. Id. at 463.

27. Id. (citations omitted).

In Sunkist Growers Inc. v. Federal Trade Commission, 464 F. Supp. 302, 308-12 (C.D. Cal. 1979), the district court held, similarly to Borden and Maryland and Virginia, that Congress did not intend for the Capper-Volstead Act to exempt cooperatives from section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).

28. 308 U.S. at 206.

29. 362 U.S. at 468.

30. In Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984 (N.D. Cal. 1976), the plaintiff argued that Capper-Volstead only applies to "small struggling farmers," not big corporate businesses. 413 F. Supp. at 991. The district court rejected this, noting that nowhere in the Capper-Volstead Act is there a restriction on the size of

Capper-Volstead growers. 413 F. Supp. at 993-94 n.11. But see National Broiler Marketing Assn. v. United States, 436 U.S. 816 (1978), for the view that Capper-Volstead protects small, nonintegrated farmers, 436 U.S. 840, 847 (White, J., dissenting), and certainly not the behemoths of agribusiness, 436 U.S. 829, 834-35 (Brennan, J., concurring).

31. In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), the Supreme Court rejected Sunkist's argument that Capper-Volstead protects any organizational structure provided growers receive the benefits of the collective activity. The Court held that Capper-Volstead benefits only actual farmers and the associations they operate for their mutual help as producers. Id. at 384, 390. See also *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978).

32. The principal cases here include *Maryland and Virginia*, 362 U.S. at 466; *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984 (N.D. Cal.), aff'd, 580 F.2d 369 (9th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); and *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981).

33. Paterson, supra note 18.

34. Id.

35. 362 U.S. at 466.

36. Just because a cooperative is not eligible for Capper-Volstead protection does not mean it has violated the monopolization proscription in the Sherman Act.

37. 1980-1 Trade Cas. (CCH) ¶ 63,029 (D. Vt. 1979), aff'd in part, vacated in part and remanded, 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981).

38. 1980-1 Trade Cas. at 77,115 and 77,119.

39. Id. at 77,116.

40. Id. at 77,116-119.

41. Id.

42. Id. at 77,116. ("We do not doubt that proof of predatory practices adds substantial weight to a plaintiff's monopoly claim, but we refuse to hold that it is a necessary element.")

43. 635 F.2d 1037 (1980).

44. Id. at 1040-43, 1045.

45. Id. at 1040, 1043-44.

46. Id. at 1040.

47. Id. at 1045.

48. Id. at 1044.

49. While Fairdale I is the first case to hold expressly that "cooperatives may grow into monopolies," 635 F.2d at 1040, earlier cases had indicated this. For instance, in Cape Cod Food Products, Inc. v. National Cranberry Association, Judge Wyzanski--who authored United Shoe Machinery--advised the jury that a cooperative may achieve "100 percent of the market through skill, efficiency, superiority of

product," or through the marketing agreements Capper-Volstead authorizes. 119 F. Supp. 900, 907 (D. Mass. 1954). Justice White indicated the same thing in National Broiler, noting that it was with Capper-Volstead that Congress allows farmers lawfully to transform monopsony into bilateral monopoly. 436 U.S. 840, 842 (White and Stewart, J.J., dissenting) (dicta). Other cases provide similar support for the proposition that a cooperative can have monopoly power. E.g., Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 483 (E.D. Mo. 1965); Shoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F. Supp. 260, 268 (D. Colo. 1964). In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962), the Supreme Court observed without comment that the jury had been instructed that Sunkist could lawfully have a monopoly. Id. at 24. Since the only issue before the Court was interorganizational conspiracy, however, this provides only limited support for the proposition of lawful cooperative monopoly power. Id. at 21.

50. United States v. Dairymen, Inc. 660 F.2d 192, 194 (1981).

51. Alexander v. National Farmers Organization, 687 F.2d 1173, 1182 (1982).

52. Holly Sugar Corporation v. Goshen County Cooperative Beet Growers Association, 725 F.2d 564, 569 (1984).

53. Kinnett Dairies, Inc., v. Dairymen, Inc., 512 F. Supp. 608, 642 (M.D. Ga. 1981), aff'd, 715 F.2d 520, 521 (1983).

54. GVF Cannery, Inc. v. California Tomato Growers Association, Inc., 511 F. Supp. 711, 714-15 (N.D. Cal. 1981) also endorses Fairdale

I. The holding in Fairdale I is anticipated in Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1203-1204 (9th Cir. 1975); Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., 497 F.2d 203, 209, 210-17 (9th Cir. 1974); Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 451-52, 459 (9th Cir. 1966).

55. If a plaintiff does not satisfy his burden of proof, the cooperative with monopoly power is still subject to monitoring for undue price enhancement under section 2 of Capper-Volstead. See Fairdale II, 715 F.2d at 32; Dairymen, Inc., 660 F.2d at 194 n.4. The enforcement record under section 2 indicates that this monitoring may not be very stringent. See Folsom, "Antitrust Enforcement Under the Secretaries of Agriculture and Commerce," 80 Colum. L. Rev. 1623, 1634-35 (1980).

56. Commentators and at least one district court appear to read Fairdale I narrowly on what is predatory. Despite repeated references in Fairdale I to conduct less egregious than picketing, harassment, boycotts, coerced membership, and discriminatory pricing, 635 F.2d at 1044, they have confined Fairdale I to this conduct. See, e.g., Recent Developments, "The Agricultural Cooperative Antitrust Exemption-- Fairdale Farms, Inc. v. Yankee Milk, Inc.," 67 Cornell L. Rev. 396, 397-98 (1982) (Under Fairdale I, "an agricultural cooperative is liable for monopoly only if it commits predatory acts. The court's holding ignores numerous pronouncements" to the contrary.); GVF Cannery, Inc. v. California Tomato Growers Association, Inc., 511 F. Supp. 711,

715-16 (N.D. Cal. 1981) (enumerating predatory acts which would satisfy Sherman section 2). One explanation that has not been used as a justification for reading Fairdale I narrowly is the Second Circuit's narrow application of "predatory" in Fairdale II. 715 F.2d 30, 31-34 (1983).

57. United States v. Dairymen, Inc., 660 F.2d at 194.

58. Id.

59. Id. at 195.

60. 119 F. Supp. at 908.

61. Maryland and Virginia, 362 U.S. at 472 (citing Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)).

62. Knutson, supra note 12, at 143.

63. Id.

64. P. Helmberger and S. Hoos, Cooperative Bargaining in Agriculture: Grower-Processor Markets for Fruits and Vegetables 28 (1965) [hereinafter cited as Cooperative Bargaining].

65. Id.

66. Bunje refers to this type of bargaining cooperative as the marketing type. Cooperative Farm Bargaining and Price Negotiations 45-46 (U.S.D.A., Cooperative Info. Rep. No. 26, 1980).

67. Id. at 46-47.

68. Id. at 48-51.

Bunje identifies two additional types of bargaining cooperatives. One corresponds to the National Farmers Organization (NFO) model where a producer designates the NFO as an exclusive agent in collective

bargaining with buyers. Id. at 47-48. The other type refers to state-supported bargaining arrangements with provisions for arbitration. Id. at 51-52.

69. Mighell and Jones, "Vertical Coordination in Agriculture" at 39 (U.S.D.A., Agri. Econ. Rep. No. 19, Feb. 1963) [hereinafter cited as Mighell].

70. "Marketing Cooperatives in the U.S.: Membership Policies, Market Power, and Antitrust Policy," 48 J. Farm Econ. 23, 30 (1966).

71. Hoos, "Economic Possibilities and Limitation of Cooperative Bargaining Associations," in Cooperative Bargaining 12, 24 (U.S.D.A., F.C.S. Service Rep. No. 113, Aug. 1970) [hereinafter cited as Hoos].

72. If there is no output control, a higher price will stimulate a larger supply thereby lowering the market clearing price.

73. Helmberger and Hoos, "Economic Theory of Bargaining in Agriculture," 45 J. Farm Econ. 1272, 1273 (1963) [hereinafter cited as "Economic Theory of Bargaining"].

74. Hoos, supra note 71, at 20.

75. Id.

76. Mighell, supra note 69, at 40-41.

77. "Economic Theory of Bargaining," supra note 73, at 1272-73.

78. Id.

79. Id. at 1278.

80. Hoos, supra note 71, at 22.

81. Cooperative Bargaining, supra note 64, at 182.

82. Hoos, supra note 71, at 19. A single use might be, say, for

fresh consumption. Bargaining is more complicated when a product has fresh, canned, or processed outlets and has numerous maturing dates, grades, and sizes. Id.

83. "Economic Theory of Bargaining," supra note 73, at 1280.

84. Turner, "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281, 304 (1956).

85. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

86. This accounts for the popularity of the Herfindahl-Hirschman (Herfindahl) Index of market concentration. The Herfindahl Index is a summary concentration measure reflecting market share and dispersion of market share among firms. The market Herfindahl is the sum of each firm's squared market share. For the largest four firms, the Herfindahl is the sum of each's squared market share. If there were five firms in a market and one firm had 40 percent of sales and each of the other firms had 15 percent, the market Herfindahl would be 2500. If the same five firms each had twenty percent of the market, the Herfindahl would be 2000. The difference reflects the disparity of market power in the first example. See F. Scherer, Industrial Market Structure and Economic Performance at 58-59 (2d ed. 1980) [hereinafter cited as Scherer].

87. E.g., Borden, Inc., 92 F.T.C. 669 (1978) (reconstituted lemon juice.)

88. Stocking and Mueller, "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955).

89. This is limit pricing. Scherer, supra note 86, at 234.

90. For example, in United Shoe, United Shoe Machinery Corporation refused to sell to shoe manufacturers the machinery generating the most revenues. It only offered a leasing option. 110 F. Supp. 295, 314, 340 (1954).

91. Leibenstein refers to the relationship between actual productive performance and technically efficient performance as "X-efficiency." A firm may be X-inefficient due to incomplete knowledge of available techniques, motivation, learning and psychological factors. "Allocative Efficiency vs. 'X-Efficiency'," 56 Am. Econ. Rev. 392 (1966). For an extensive survey of productive efficiency in agriculture, see French, "The Analysis of Productive Efficiency in Agricultural Marketing: Models, Methods, and Progress," in 1 A Survey of Agricultural Economics Literature 93 (Martin ed. 1977).

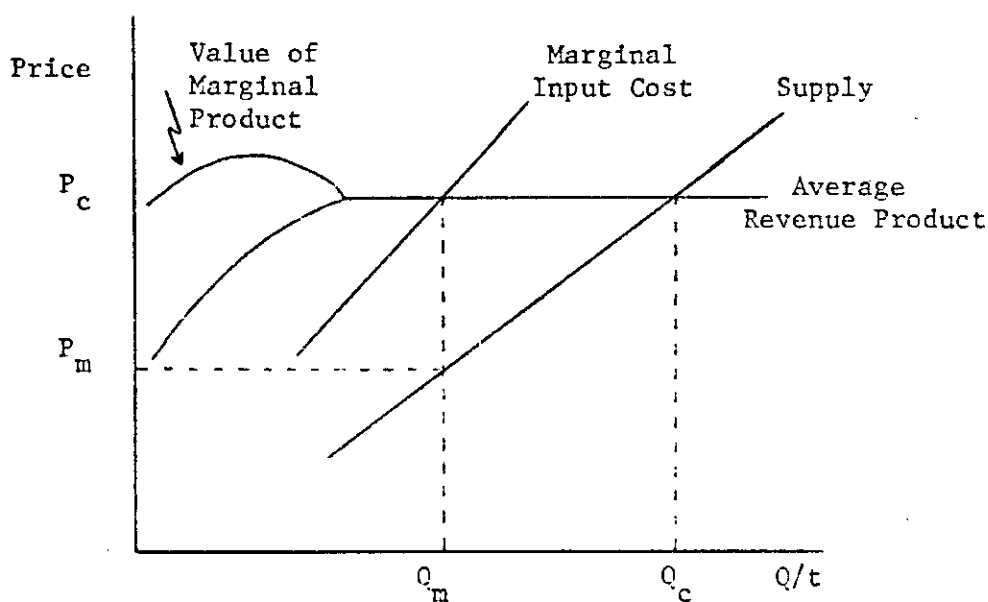
92. If a firm does not adjust price to account for changes in costs or demand, this indicates that the firm, insulated from market conditions, is more powerful.

93. Jesse and Johnson, "Defining and Identifying Undue Price Enhancement," in Antitrust Treatment of Agricultural Marketing Cooperatives 61, 92-98 (N.C. Project 117, Monograph 15, U.W.-Madison, Sept. 1983) [hereinafter cited as Jesse-Johnson]; Jesse and Johnson, "Marketing Cooperatives and Undue Price Enhancement: A Theoretical Perspective," (N.C. Project 117, Work. Pap. No. 46, U.W.-Madison, Oct. 1980) [hereinafter cited as "Undue Price Enhancement"]; Helmberger, "Cooperative Enterprise as a Structural Dimension of Farm Markets," 46 J. Farm Econ. 603 (1964); Youde and Helmberger, "Marketing Cooperatives in the

U.S.: Membership Policies, Market Power, and Antitrust Policy," 48 J. Farm Econ. 23 (1966).

94. Regardless of the case, we assume that the cooperative returns all net revenues to its producers.

95.



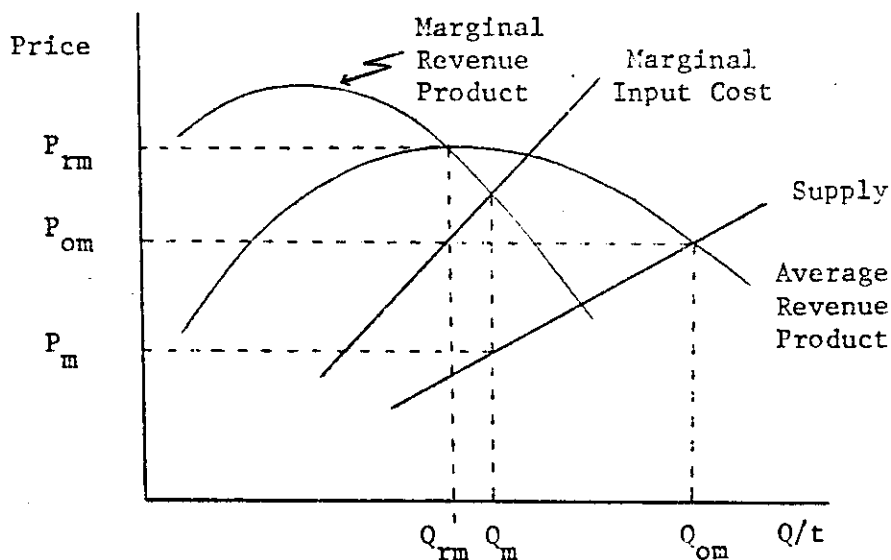
If there are no diseconomies to scale and all economies are realized early on, the long run average revenue product curve (revenue minus cost divided by quantity of raw product purchased) will be horizontal in the relevant range. Since there is no incentive to restrict supply, the OM and the RM cooperative will process Q_c and pay producers P_c . In contrast, the private monopsonist will equate marginal input cost with average revenue product, paying producers P_m for quantity Q_m .

96. Processing is used loosely here. In a given case it could

refer to processing, assembling, or marketing. "Undue Price Enhancement," supra note 93, at 2.

97. Jesse-Johnson, supra note 93, at 95.

98.



Assuming that the average revenue product curve (ARP) is downward sloping in the relevant range for a monopolist, the OM cooperative will equate ARP with supply, purchasing Q_{om} and paying producers P_{om} . Without supply control, if the cooperative were to raise price above P_{om} there would be excess supply. P_{om} and Q_{om} represent the long run solution under perfect competition. The private monopsonist monopolist will equate marginal revenue with marginal cost, purchasing Q_m and paying producers P_m .

99. The RM cooperative has an incentive to limit supply so that S

in note 98 supra intersects ARP at its maximum. As drawn, this means producers who are members would receive P_{rm} and the cooperative would purchase Q_{rm} .

100. Jesse-Johnson, supra note 93, at 95-96.

101. "Undue Price Enhancement," supra note 93, at 23-30. Under their assumption that the cooperative has discretion in selecting processed product output, Jesse and Johnson show that the level of output associated with the competitive solution will not be met. Output will exceed the private firm solution, however. Id.

102. Jesse-Johnson, supra note 93, at 97-98.

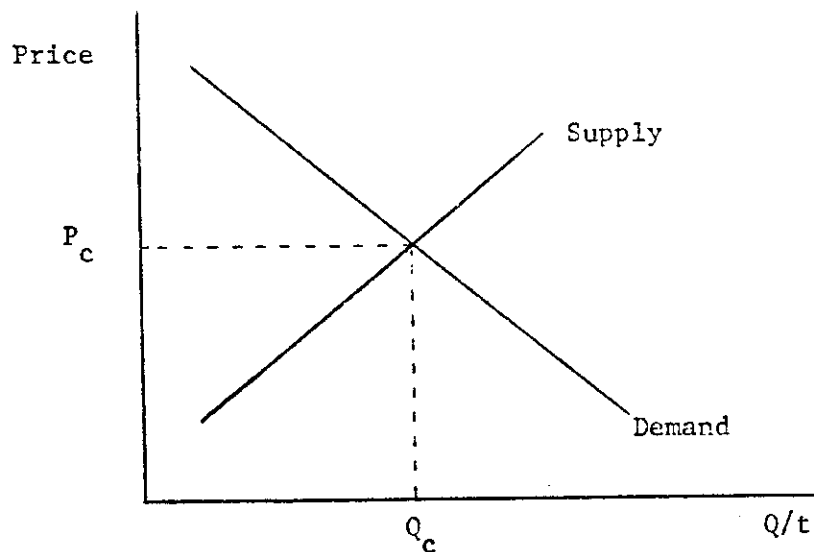
103. Id. at 98-101.

104. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601, 602, 608a, 608b, 608d, 610, 612, 614, 624, 671-74 (1976), is the enabling legislation for federal marketing orders and agreements. State and federal orders variously authorize, for example, producer participation in control over volume marketed, quality, distribution, or pricing of individual commodities in particular geographic regions. Jesse and Johnson review orders on fruits and vegetables in "Effectiveness of Federal Marketing Orders for Fruits and Vegetables." (U.S.D.A. E.S.C.S., Agri. Econ. Rep. No. 741, June 1981).

105. Nonprice terms might include delivery conditions, grade or quality requirements, or payment schedules. Brandow observes that the bargaining cooperative may have its greatest success in improving nonprice sales terms. "The Place of Bargaining in Agriculture," in Cooperative Bargaining 27, 31 (U.S.D.A., F.C.S. Service Rep. No. 113,

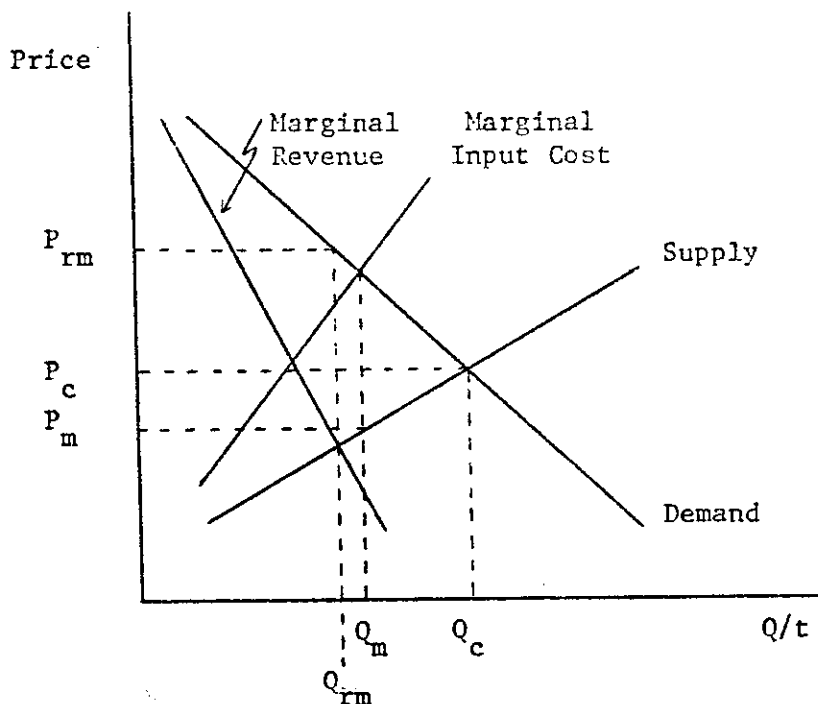
Aug. 1970). Helmberger and Hoos make the same point, emphasizing the cooperative's importance in obtaining similar contract provisions in contract production agreements. "Economic Theory of Bargaining," supra note 73, at 1279-80.

106. Cooperative Bargaining, supra note 64, at 53-59.



If the cooperative raises price above P_c , producers will supply more than Q_c and buyers will demand less than Q_c . Without control over supply, price to producers will be P_c --the price they would receive without the cooperative. Producers would have an incentive to use a cooperative if it improved their marketing efficiency, say by lowering transactions costs. But this is aside from the exertion of market power.

107. Id. at 59-62.



If the monopsonist dominates, price equals P_m for quantity Q_m . If the cooperative without supply control is dominant, price equals P_c for quantity Q_c . If the cooperative can effectively control supply, price equals P_{rm} for quantity Q_{rm} .

108. See text corresponding to notes 91-92 supra.

109. See note 20 supra.

110. 362 U.S. at 466.

111. From this it would seem to follow readily that this is also an unduly enhanced price under section 2 of Capper-Volstead. See Mueller, "The Enforcement of Section 2 of the Capper-Volstead Act," in Antitrust Treatment of Agricultural Marketing Cooperatives 135, 139 (N.C. Project 117, Monograph 15, U.W.-Madison, Sept. 1983). See this

way, Capper-Volstead section 2 reaches a subclass of prices that may be attributable to monopoly. It reaches the unduly enhanced price but not the price that is, say, strategically set to deter new entry.

Strategic pricing may support a finding of monopolization under the Sherman Act.

112. An example of a monopoly price is suggested in the Federal Trade Commission's action against Borden on its lemon juice. Borden, Inc., 92 F.T.C. 669 (1978). Evidence in that case revealed that ReaLemon Lemon Juice commanded a premium of as high as 25 to 30 cents per unit or 30 percent over competitive offerings, even though reconstituted lemon juice is basically reconstituted lemon juice. Id. at 789-90.

113. Id. at 794 (citing *United States v. Griffith*, 334 U.S. 100 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); and *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)).

114. E.g., Borden, 92 F.T.C. at 802-803; *Telex Corp. v. IBM*, 510 F.2d 894, 925-26 (10th Cir. 1975).

115. Sullivan, supra note 6, at 108.

116. Id. at 111-12.

117. Id.

118. Areeda and Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697 and 709 (1975).

119. Id. at 732-33. Areeda and Turner use average variable cost as a surrogate for marginal cost. Id. at 716-18. They recognize an

exception to their rule when average total cost is less than price which is less than marginal cost. Id. at 712.

120. Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 Harv. L. Rev. 868, 890 (1976).

121. Id.

122. Most courts have now agreed that sustained sales at prices below average variable cost--the proxy for marginal cost--should be rebuttably presumed to be predatory. Prices equal to or greater than average variable cost are not necessarily predatory. E.g., D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1437 (6th Cir. 1983), cert. denied, 52 U.S.L.W. 3886, 3891 (U.S. June 12, 1984); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); Northeastern Tel. Co. v. AT&T Co., 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976). The FTC announced its similar rule in International Telephone & Telegraph [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 117, at 283, 286 (Aug. 9, 1984).

123. E.g., R. Posner, Antitrust Law: An Economic Perspective 188-93 (1976); Joskow and Klevorick, "A Framework for Analyzing Predatory Pricing Policy," 89 Yale L.J. 213, 252 (1979); Greer, "A Critique of Areeda and Turner's Standard for Predatory Practices," 24 Antitrust Bull. 233, 261 (1979).

124. Mueller, "Alleged Predatory Conduct in Food Retailing" at

9-10 (N.C. Project 117 Working Paper No. 78, U.W.-Madison, Sept. 1984).

125. When associated with price below even average total cost, Greer identifies the following as predatory conduct or evidence of predatory intent: threatening phone calls; internal memoranda or letters expressing intent; long-term business plans of injurious price-cutting activity; recorded appreciation of the consequences of such activities; penetrating studies of the victim's financial weaknesses and staying power under adverse price circumstances; bribing distributors to refuse service to victims; bribing government officials to harass the victims or block their use of public facilities such as ports; directly harassing victims with needless and unfounded patent infringement suits or other costly legal actions; and sabotage. "A Critique of Areeda and Turner's Standard for Predatory Practices," 24 Antitrust Bull. 233, 247-48 (1979). Mueller illustrates the use of financial studies in a predatory pricing action, "Alleged Predatory Conduct in Food Retailing" (N.C. Project 117 Working Paper No. 78, U.W.-Madison, Sept. 1984).

126. See text corresponding to note 83 supra.

127. A conspiracy to monopolize and an attempt to monopolize both require proof of specific exclusionary intent. Conduct demonstrating a specific intent is sufficient evidence of a general exclusionary intent in a monopolization charge, *United States v. Griffith*, 334 U.S. 100, 105 (1948), and is therefore relevant for our purposes. Power in a relevant market may be indicative of intent or of the probability of success in a conspiracy or an attempt case. Circuits are divided on

whether evidence of a relevant market is necessary. See Sullivan, supra note 6, at 132-40.

128. 119 F. Supp. 900 (D. Mass. 1954).

129. Id. at 906.

130. Id. at 907.

131. Id. This charge related to an alleged conspiracy to monopolize between a cooperative, several individuals, and a trust company. The instruction is significant because it includes conduct that would be legitimate if used in good faith.

132. Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458, 472 (1962). The observation was made in the context of an alleged restraint of trade unlawful under Sherman section 1. Earlier in the opinion, the Court indicated that practices unlawful under section 1 may support a violation of section 2. Id. at 463.

133. Id. at 460.

134. Id. at 468.

135. Id.

136. 241 F. Supp. 476 (E.D. Mo. 1965).

137. Id. at 483.

138. There was no discussion of whether the milk was Grade A or Grade B. Grade A milk can be used for fluid consumption or for processing. Because of sanitation requirements, Grade B milk cannot be used for fluid consumption.

139. 241 F. Supp. at 483.

140. Id.

141. Conduct satisfying the requisite threshold of specific intent for an alleged attempt to monopolize claim also satisfies the general intent necessary in an alleged monopolization claim. *United States v. Griffith*, 334 U.S. 100, 105 (1948).

142. 241 F. Supp. at 479-85.

143. 348 F.2d 189 (5th Cir. 1965).

144. The plaintiff alleged monopolization or attempted monopolization. The Fifth Circuit could not discern on what claim the jury returned its verdict. *Id.* at 196.

145. *Id.* at 194.

146. *Id.* The price prior to the increase was \$5.30 per hundred-weight. *Id.* at 194.

147. *Id.* at 195-96.

148. *Id.*

149. 388 F.2d 789 (3d Cir. 1967).

150. The decision refers to monopolizing and endeavoring to monopolize.

151. These factors indicate an attempt to monopolize theory.

152. 388 F.2d at 797.

153. *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420 (3d Cir. 1968).

154. This case reveals that conduct that may lead to a cooperative losing its eligibility for Capper-Volstead protection--joining with nonproducers--may also represent conduct supporting a finding of the specific intent that is sufficient for a monopolization claim.

155. 420 F.2d at 424.

156. Id. at 423-24.

157. 369 F.2d 449 (9th Cir. 1966).

158. While *Grinnell*, 384 U.S. 563 (1966), clearly presents the elements in a monopolization claim, Judge Hand indicated these in *Alcoa*, 148 F.2d 416 (2d Cir. 1945), and the test received subsequent explication in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), and in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

159. Id. at 458.

160. Id. at 457-58 and n.15.

161. Id. at 459.

162. Id. at 459, 462.

163. Id. at 459.

164. 526 F.2d 1196 (1975).

165. Sunkist growers produced about 75 percent of all California-Arizona oranges during the relevant time period. Id. at 1201.

166. Prior to selling directly, Sunkist had relied on numerous export companies, including the plaintiffs, to serve the Hong Kong market. Id.

167. Id. at 1204.

168. Id. (citing *Alcoa*, 148 F.2d 416, 424 (2d Cir. 1945)).

169. Id.

170. Id.

171. Id.

172. Id.

173. 715 F.2d 30 (1983). Judge Van Graafeiland authored Fairdale I and Fairdale II.

174. 715 F.2d at 34.

175. It would seem that, to a considerable measure, the inartfulness of Fairdale II reflects the plaintiff's presentation and the instruction given in Fairdale I for the district court to consider "predatory practices" in deciding whether to grant the defendant's motion for summary judgment.

176. 715 F.2d at 32.

177. The court apparently followed the Areeda-Turner marginal-cost test for predatory pricing. Id. at 33 (citing Areeda and Turner, III Antitrust Law ¶ 710 at 149). (The rule is actually presented in ¶ 711 at 153-54.)

178. 715 F.2d at 32-33.

179. Id. at 33-34.

180. Absent monopoly power, a finding of predatory practices is not sufficient to satisfy Sherman section 2. It would also seem that without a prior assessment of market power, a court is confined to looking only at the truly predatory acts evident in attempt and conspiracy cases.

181. 511 F. Supp. 711 (N.D. Cal. 1981).

182. Id. at 715.

183. Id. at 715-16.

The district court never cited Pacific Coast Agricultural Export

Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975), where less egregious conduct was held to be sufficient evidence of acts of monopolization. Moreover, the district court's analysis of the Ninth Circuit decision in Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (1966), is too narrow. 511 F. Supp. at 715-16.

184. 512 F. Supp. 608 (M.D. Ga. 1981), aff'd, 715 F.2d 520 (1983).

185. 512 F. Supp. at 612.

186. The cooperative with monopoly power cannot refuse to deal on reasonable nondiscriminatory terms with rivals or buyers. Id. at 632; see also Fairdale II, 715 F.2d 33-34; Pacific Coast Export, 526 F.2d at 1209.

187. This would be a federated cooperative.

188. 512 F. Supp. at 632-33.

189. Id. at 633.

190. Id.

191. Id. at 639.

192. Id. at 624, 629.

193. Id. at 640-41.

194. Id. at 643.

195. Id.

196. Id.

197. In a separate Government case against Dairymen, Inc. charging an attempt to monopolize, the Sixth Circuit held that the district court had used too stringent a test of predation and had improperly rejected proposed submarkets. United States v. Dairymen, Inc., 660

F.2d 192 (1981). Presented with similar arguments on appeal in Kinnett, the Sixth Circuit affirmed the district court holding. The court found that the district court did not use an overly stringent test of predation to evaluate the cooperative's conduct and that the district court adequately considered proposed submarkets in its evaluation of monopoly power. 715 F.2d 520, 521 (1983). Neither appeals court made a distinction between the conduct satisfying the requisite intent for an attempt to monopolize charge and a monopolization charge.

198. 687 F.2d 1173 (1982).

199. Id. at 1192.

In the context of a conspiracy to monopolize charge, the court elaborated on the network of arrangements the cooperatives used to enhance their overall control. The cooperatives allocated territories, shared control, and met jointly to discuss certain threats to their market power. Id. at 1194-95.

200. Id. at 1191.

201. Id. at 1192. See note 199 supra.

202. Id. at 1192.

203. Id.

204. Evidence of specific intent to monopolize would also be evidence of a general intent to monopolize in a monopolization claim. United States v. Griffith, 334 U.S. 100, 105 (1948).

205. In Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019 (S.D. Tex. 1972), the district court

indicated that a firm is not "entitled to abuse regulatory schemes through the persistent filing of complaints and appeals to harass competitors and to keep them from securing operating permits." Accordingly, "activities under the cover of a federal milk order designed to achieve a monopoly position ... can violate the antitrust laws." Id. at 1023.

206. 687 F.2d at 1194-1207.

207. Id. at 1179.

208. *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945).

209. 369 F.2d 449 (9th Cir. 1966).

210. Commentators also casually associate a high cooperative market share with monopoly power, treating it the same as a high market share for a proprietary firm. E.g., Note, "Establishing Bargaining Units in Agricultural Marketing," 68 Va. L. Rev. 1293, 1294, 1299 (1982); Antitrust Law, "Fairdale Farms, Inc. v. Yankee Milk, Inc.: The Right of Agricultural Cooperatives to Possess Monopoly Power," 7 J. Corp. L. 339, 351 (1982) ("Obviously, a cooperative will almost always possess monopoly power soon after it is formed"); Warlich and Brill, "Cooperatives Vis-A-Vis Corporations: Size, Antitrust and Immunity," 23 S.D.L. Rev. 561, 566-68 (1978).