United States
Department of
Agriculture

Economic
Research
Service

ERS-673

The Status of Marketing Cooperatives Under Antitrust Law

Alden C. Manchester

THE STATUS OF MARKETING COOPERATIVES UNDER ANTITRUST LAW, by Alden C. Manchester, National Economics Division, Economic Research Service, U.S. Department of Agriculture. ERS-673.

ABSTRACT

Review of the development and current state of antitrust law regarding cooperatives shows that interpretations of legal activities for farmer marketing cooperatives have varied widely. A public policy defining the scope of exemptions granted cooperatives by the Capper-Volstead Act of 1922 and defining procedures for determining undue price enhancement under the act would improve the operating climate for cooperatives. Recognizing the intense competition and importance of large, diversified firms in the food industry, the policy should foster workable, as opposed to perfect, competition, and permit marketing cooperatives to participate in the economy as fully as other firms.

Keywords: Agricultural marketing, Antitrust law, Capper-Volstead Act, Cooperatives, Monopoly, Restraint of trade

ACKNOWLEDGMENTS

I would like to express my appreciation to James Baarda, economist and lawyer with the Agricultural Cooperative Service, for educating me in the intricacies of antitrust law and economics. I also appreciate the help of Marshall Godwin and the work of Edward Jesse and A.C. (Cobe) Johnson in improving my perception of problems and approaches.

Washington, D.C. 20250 February 1982

CONTENTS

HIGHLIGHTS

A public policy regarding the partial exemption of farmer cooperatives from antitrust law could improve their operating climate and permit them to participate fully in the U.S. food sector. This report suggests a basis for such a policy, based on a framework of past legal decisions and an understanding of contemporary competitive pressures.

With enactment of the Capper-Volstead Act of 1922, farmers won the clear right to market their products through cooperatives without violating antitrust statutes. Legal rulings as to precisely what cooperative activities are included under the exemption have varied widely over the years. So, too, have interpretations of the section of the Act that requires the Secretary of Agriculture to restrain cooperatives from unduly enhancing prices through monopolization or restraint of trade.

Investigation by the USDA of an alleged case of price enhancement was requested for the first time in 1969. Since then, further investigations and a school of thought favoring limits on cooperative size and market power have created a climate of uncertainty for farmer cooperatives.

Adoption of a policy defining the scope of the Capper-Volstead exemption and the principles followed in determining cases of undue price enhancement would lessen this uncertainty and promote public understanding of the role of cooperatives.

A policy could be based on three premises:

- First, that the partial exemption from antitrust laws granted by the Capper-Volstead Act recognizes real differences in the bases for market power of cooperatives and other kinds of firms that buy farmers' products.

- Second, that cooperatives should be permitted to participate fully in the modern American economy, not subject to greater restrictions than those imposed on other firms after allowing for the differences mentioned in the first premise.

- Third, that cooperatives should be allowed to acquire market power, subject to the limitations on undue price enhancement, monopolization, and restraint of trade contained in the Capper-Volstead Act.

An investor-owned business corporation that markets agricultural products, unlike a cooperative, is a legal entity whose owners have invested capital in the hope of making a profit. A cooperative is a legal entity formed by a group of farmers who produce one or more agricultural products for the purpose of conducting their marketing operations. The net margins (profits) of a corporation are returned to its owners on the basis of investment, while the net margins of a marketing cooperative are returned to its members on the basis of patronage.

The premise that cooperatives should be permitted full participation in the American economy is based on the conclusion that firms not free to be fully competitive are unlikely to survive in the food sector. Investor pressure and tax structure push noncooperative food firms to maximize returns on investment rather than to maximize productivity. This makes for highly diversified, highly competitive firms. Cooperatives that produce finished food products for the retail market need the freedom to use sophisticated marketing tools to bid for the food dollars of consumers who are, in the aggregate, affluent.

Such freedom might be denied cooperatives under a policy that viewed, for example, marketing of a branded retail product at a higher price as undue price enhancement. However, in antitrust cases, the courts have generally rejected such strict regulation of noncooperative business. They have in effect held that pursuit of an idealized state of perfect competition is neither possible nor desirable. Rather, court decisions have been implicitly based on a concept of "workable competition", allowing firms freedom to exercise market power within the broad limits of antitrust statutes.

Workable competition is the only appropriate basis for policy regarding cooperatives. Within the framework of workable competition, an appropriate interpretation of cooperative organizations and activities permitted under the Capper-Volstead Act might have the following dimensions:

- A marketing cooperative qualifies for partial exemption from antitrust statutes under Section 1 of the act even if it performs just one of many possible marketing functions. A cooperative which only bargains over price for its members is thus a qualified Capper-Volstead cooperative.

- Setting prices is an essential function of a marketing cooperative and, as long as it involves only cooperatives and their members, is fully within the scope of the cooperative exemption of the Capper-Volstead Act and is legal.

- Marketing agencies in common which are permitted under the Act are legal, whatever their form--whether sales agency, federation or other form--as long as they involve only cooperatives. Similarly, mergers among cooperatives are fully covered by the exemption, although acquisitions of noncooperative firms are not.

- Vertical integration and product differentiation are legal activities both of cooperatives and other corporations.

- Membership contracts and marketing agreements are an essential element of marketing cooperative activity as for other business corporations and legal in most circumstances.

- Full supply contracts under which the cooperative agrees to supply all the needs of the buyer and the buyer agrees to buy only from the cooperative are permitted unless intent to foreclose the market to others can be shown. Other business corporations have an unquestioned right to limit their production. In most cases, the agricultural marketing cooperative should have similar rights.

- The existence of a cooperative monopoly is not illegal under the antitrust laws. However, if such a cooperative were to use its market power to unduly enhance prices, its activities might constitute monopolization and thus a violation of Section 2 of the Capper-Volstead Act.

- Section 2 prohibits undue price enhancement by an agricultural cooperative because of acts of monopolization or restraint of trade. Unduly enhanced prices are simply those which are too high because of the proscribed activity. With the exception of those activities which fall within the partial exemption of Section 1 of the Act, the proscribed acts of monopolization or restraint of trade for a marketing cooperative are the same as for another kind of business. With the exception of a few _per se_ prohibitions, the decision as to whether a certain set of activities constitutes illegal monopolization or restraint of trade must be reached by application of the rule of reason. In other words, it must be decided whether the acts unreasonably restrained trade or monopolized the market. The rule of reason applies in consideration of a case of possible undue price enhancement. In each case, extended economic analysis would be conducted to reach a decision as to whether specific acts unreasonably restrained trade or monopolized the market and unduly enhanced prices.

The Status of Marketing Cooperatives Under Antitrust Law

Alden C. Manchester*

INTRODUCTION

This study traces the evolution and current status of antitrust law as it affects agricultural marketing cooperatives. It then discusses competition and the role of marketing cooperatives in the modern U.S. economy. Using the legal status and economic position of cooperatives as a framework, it suggests a basis for public policy regarding the activities of marketing cooperatives under the Capper-Volstead Act of 1922.

That law exempts farmer cooperatives from some of the restrictions imposed by antitrust laws. This lets them obtain greater returns through cooperative marketing. However, the law also requires the Secretary of Agriculture to restrain cooperatives from acts which result in undue price enhancement through monopolization and restraint of trade.

As the first section of this report will show, the scope and key terms of the Capper-Volstead Act have been subject to changing interpretations, leaving uncertain what actions by cooperatives are within the law. The policy suggested by this report would define more precisely the scope of exemptions in Section 1 of the act and the meaning of "undue price enhancement," "monopolization," and "restraint of trade" in Section 2.

The report was prepared by the Economic Research Service as part of its obligation to support the Secretary of Agriculture in carrying out responsibilities under the Capper-Volstead Act. The purpose is to contribute to the intellectual base for thinking about and discussing cooperative antitrust law, and to provide useful guidance to those responsible for and subject to Section 2.

The most basic question regarding public policy toward farmer cooperatives is, "Why have a specific antitrust policy for marketing cooperatives different in some ways from that for other firms?" National antitrust policy is based on the assumption that, in the U.S. economy, competition yields certain desirable results--in economists' terms, efficient allocation of

---

* The author is senior economist in the National Economics Division.

resources, lower prices to consumers through more efficient operation of firms producing and distributing goods and services, and a greater degree of economic freedom for such firms in entering and leaving any line of business. The rules established under the antitrust laws are intended to protect and foster competition. If those rules are to be modified for certain groups, for example, marketing cooperatives or labor unions, there must be compelling reasons to do so. At least two reasons for modifying those general rules are:

- The rules do not protect competition and may actually have perverse effects in the particular case, or

- Competition, although protected and usually desirable, does not yield the expected beneficial results.

In enacting the Capper-Volstead Act, Congress recognized some fundamental differences between agriculture and other parts of the economy and set forth a somewhat different policy dealing with agricultural marketing cooperatives. The Supreme Court confirmed the basis for a different policy. In Tigner v. Texas 40 years ago, Justice Frankfurter summarized the differences which might result from combinations of farmers as compared to combinations of industrialists or middlemen. These differences led to a very different price and production policy for agriculture than for industry and commerce (75, pp. 145-7).1/ In discussing public policy regarding cooperatives, these issues of "Why different for cooperatives?" will be considered.

Appendix A of the report provides the text of the Capper-Volstead Act. Appendix B summarizes seven investigations of undue price enhancement under the Act.

THE DEVELOPMENT AND CURRENT STATE OF THE LAW

> Antitrust is, first and most obviously, law, and law made primarily by judges . . . . Antitrust is also a set of continually evolving theories about the economics of industrial organization. (5, p. 10)

To understand the development and present state of antitrust law relating to agricultural marketing cooperatives, we will look first to the statutes and then to court decisions.

Congress established policy in very broad terms in three basic antitrust statutes and in the "Magna Charta" of marketing cooperatives, the Capper-Volstead Act of 1922. The three antitrust statutes were the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. The Capper-Volstead Act modified the law emanating from them.

Given these broad guidelines, the interpretations of the courts constitute nearly all of the specifics of the law. But one must remember that in every case--especially in antitrust law--the

---

1/ Underscored numbers in parentheses refer to literature cited in the References at the end of the report.

decision is made by applying the principles as the court sees them to the facts and circumstances, also as the court sees them, of the particular case. Thus, quoting out of context from court decisions may be even more misleading than it is in the more general case.

Legislative History

> Not only is the purpose of Congress a dominant factor in determining the meaning of an act, but the Supreme Court has held that no matter how clear statutory words may appear on superficial examination, resort may be had to legislative history for an explanation. Justice Holmes in commenting on the use of legislative history has said: "Upon this point a page of history is worth a volume of logic." (31, p. 399, citations omitted)

The Sherman Act

Two aspects of the legislative history of the Sherman Act of 1890 are especially pertinent to the topic of this report: (1) the question of why the particular language of the statute was chosen and (2) the intent of the Congress regarding farmer cooperatives. For discussion of broader questions regarding the legislative history see, for example, (36, Chapter 9; 31, p. 213; and 6).

Senator Sherman, on introducing the bill which became the Sherman Act, stated that the purpose was not to "announce a new principle of law" but to put into Federal law applicable to interstate commerce the "old and well-recognized principles of the common law" dealing with unlawful trusts and combinations (42, p. 2,456). 2/

> The object was to arm Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or corporations, but only to prevent and control combinations made with a view to prevent competition or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. (42, p. 2,457)
>
> I accept the law as stated by Mr. Dodd, that all combinations are not void, a proposition which no one doubts, but I assert that the tendency of all combinations of corporations, such as those commonly

---

2/ The principles of common law were not as well established as the senator implied. Handler identified three different views on the application of the rule of reason to restraints of trade (16, pp. 4-5, quoted in 31, p. 220). Senator Sherman selected cases which fit his construction of what ought to be and ignored others (5, p. 20).

> called trusts, and the inevitable effect of them, is to prevent competition and to restrain trade. This must be manifest to every intelligent mind. Still this cannot be assumed as against any combination unless upon a fair hearing it should appear to a court of competent jurisdiction that the agreement composing such combination is necessarily injurious to the public and destructive to fair trade.
>
> I admit that it is difficult to define in legal language the precise lines between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. (42, p. 2,460)

The language of the bill was shaped by the difficulty of finding constitutional grounds on which to base the powers eventually conferred in the Sherman Act, given the restricted view of interstate commerce which prevailed. The first draft of the bill assumed that the Federal Government had, as a separate State has within it own borders, full and complete jurisdiction over the subject of trusts. In the second version of the bill, jurisdiction was sought on the ground that these trusts were interfering with free competition with articles imported and to which tariffs applied, and upon the power to regulate interstate commerce. The Supreme Court had held that interstate commerce did not begin until the goods had been delivered to a common carrier for shipment to another State. Therefore, production intended for interstate commerce could not be regulated by the Federal Government as proposed.

In March 1890, Senator Sherman introduced a bill which was described by Senator George as "based upon the extraordinary proposition . . . that, because the Constitution has granted to the Courts of the United States jurisdiction in controversies between citizens of different States and between citizens of the United States and of foreign countries, therefore, the Constitution had granted to Congress legislative power to regulate the transactions between citizens of different States and between citizens of the United States and of foreign countries." (42, p. 2,600)

The language of the final act was carefully chosen using familiar terms from the common law and to fit within the existing narrow construction of the interstate commerce clause of the Constitution (5, p. 20).

The language of the Sherman Act, which was picked up in 1922 in the Capper-Volstead Act, has not had the same meaning over time. It did not necessarily have the meaning in 1890 which Senator Sherman ascribed to it (see footnote 2) and, by 1922, court interpretation had changed it greatly. Tracing the roots of this language helps to clarify how it found its way into the statute.

When Senator Sherman's bill was being considered in 1890, a number of senators were concerned that it would prohibit farmer cooperatives. Senator Stewart, referring to farmers and laborers, said:

> This measure strikes . . . at the very root of co-operation. . . . Co-operation is necessary; but co-operation has its evils. When capital is combined and strong, it will for a time produce evils, but if you take away the right of co-operation you take away the power to redress those evils; it gives rise to monopolies that are protected by law, against which the people cannot combine. They can not have other monopolies equal to them. It is that which depresses the people. (42, p. 2,606)

To allay this concern, Senator Sherman proposed an amendment first suggested by Senator George, saying: "I do not think it necessary, but at the same time to avoid any confusion, I submit it . . . . " The amendment read:

> Provided, that this act shall not be construed to apply . . . to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with view of enhancing the price of their own agricultural or horticultural products. (42, p. 2,611)

The Committee of the Whole adopted the amendment along with a number of others. But the bill was then recommitted to the Judiciary Committee, which completely redrafted it, omitting any reference to agricultural cooperatives (20; 42, p. 2,901; 43).

The Capper-Volstead Act

The Sherman Act, designed to attack industrial trusts, was used by certain parties to attack the existence of agricultural marketing cooperatives. (See, for example, (58) and (70).) In some early decisions, the act of forming a cooperative marketing association was found to constitute a *per se* combination in restraint of trade (28, pp. 1-2). Even after the passage of the Clayton Act--which provided an antitrust exemption for nonstock cooperatives--the Justice Department initiated several actions against cooperatives. This led Congress to place a rider on that Department's appropriation bill for 1914 and for several years thereafter prohibiting it from bringing any additional actions against cooperatives (28; 30, p. 251):

> . . . no part of this appropriation shall be expended for the prosecution of producers of farm products who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products. (41)

A similar provision in the appropriation bill of 1913 had been vetoed by President Taft as being evidently intended to prevent "the prosecution of combinations of producers of farm products for the purpose of artificially controlling prices." He characterized it as "class legislation of the most vicious sort," and referred to the Connolly case as presenting a similar situation (30, pp. 251-2).

In the Connolly case, the Supreme Court struck down a Texas antitrust law which contained a cooperative exemption as not providing equal protection of the laws. The Court said:

> If combinations of capital, skill, or acts . . . are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful. (76)

There was a feeling in some quarters of Congress that measures were necessary to prevent the exemption from being manipulated to "exploit the public" (46). Otherwise, as Senator Walsh stated, cooperative organizations:

> would exact such prices from the consumer, particularly for milk, as to bring the whole movement for cooperative marketing into disfavor and disrepute and have such a corrosive effect as to wipe out any statute that we may enact in relation to the subject. (44, p. 2,157)

> It would not be in the public interest, your Committee believes, to permit all producers of milk within the area from which one of our great cities is supplied to effect a single organization having thus a monopoly which might or might not be utilized to exact extortionate prices of consumers. (41; see also remarks of Senator Kellogg in 42)

The final House Committee report on the Act stated the congressional view which led to the Capper-Volstead Act:

> Whenever a farmer seeks to sell his products, he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. (46)

The Capper-Volstead bill introduced in Congress in 1920 was the same as that finally enacted (see Appendix A), with the exception of the clause limiting the amount of business with nonmembers. It was passed in this form by the House, but the Senate Judiciary Committee under the chairmanship of Senator Thomas Walsh of Montana rewrote Section 2 to read in its entirety: "Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly." The Senate passed the bill in this form, but the House refused to concur and the bill died for that session.

In 1921, with a new session of Congress, the House again passed the bill in the original form. The Senate Committee on the Judiciary under the chairmanship of Senator Walsh argued that no monopoly was possible in the great staple products, such as cereals, livestock, and cotton, but that it was possible in highly localized commodities, such as raisins and fluid milk, adding:

> . . . Your committee sees no good reason why two, three, a half dozen, or a dozen co-operative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the state of California, a monopolistic organization should be permitted and encouraged, rather than two or three co-operative associations organized and operating in similar lines.
>
> Section 2 of the House bill has for its purpose the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture. It was quite generally understood by the committee when the bill was before it at the last session that this section gave to the Secretary of Agriculture the authority to fix prices. The proponents of this bill, however, repudiate that idea and insist that it is not the proper construction of the bill, and assert that they are resolutely opposed to reposing such power in Secretary of Agriculture. They assert that the bill gives to the Secretary power to declare that a price charged is unreasonable, but gives him no power to fix what is reasonable price . . . . The experience of the Interstate Commerce Commission under a similar provision, giving it power to determine what is an unreasonable rate but no power to determine what is a reasonable rate, satisfies your committee that as this provision is construed by the proponents of the bill, and perhaps correctly, it is utterly valueless. If competition is preserved--that is to say, if no monopoly can exist under the act--regulatory provisions are superfluous. (48)

The Senate again passed its version with the added provision:

> Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceedings instituted under 'an Act to Create a Federal Trade Commission' . . . approved September 26, 1914, on account of unfair methods of competition in commerce.

The farm organizations, the Secretary of Agriculture, and the President mounted a campaign for the House version of the bill without the paragraph added by the Senate. The Senate passed the House version of the bill, with the amendment on nonmember business, by a vote of 58 in favor (including Senator Walsh) to

1 against, with 37 not voting. The House concurred with the amendment and the President signed the bill into law (20, pp. 4-10).

It has been argued by the antitrust agencies and, at times, by the courts that cooperatives were small and had limited market power when the Capper-Volstead Act was passed and that, thus, Congress did not anticipate the large cooperatives which exist today. This assumption is based on bad history. There were a number of large cooperatives in 1920-22 when the Capper-Volstead Act was under consideration and Congress was aware of them (32, 33).

Most but not all of the large cooperatives were located in California:

	Share of U.S. marketings	
	Percent	Period
California Fruit Growers Exchange (now Sunkist Growers)	61.6	1913-22
Sun-Maid Raisin Growers	84.1	1913-22
American Cranberry Exchange	61.9	1917-22
Burley Tobacco Growers Cooperative Assoc.	89.0	1922-24

Source: (32).

Three cooperatives had sales of over $10 million in 1921 and another six sales of at least $5 million. These were large-scale organizations in a year when total cash receipts from marketing of farm products were $8 billion, compared to $103 billion in 1979.

Congress was informed as to the existence of these large cooperatives. The references to raisins in the debates, already cited, indicate that Senator Walsh, for one, understood the large market share of Sun-Maid. In testimony before the Senate Committee on the Judiciary in June 1921, Charles W. Holman, secretary of the National Milk Producers Federation, discussed the large federated cooperatives and the centralized commodity pooling associations (49, pp. 172-5). He presented annual sales and volume figures for a number of cooperatives including the California Fruit Growers Exchange.

Monopolization and Restraint of Trade

Section 2 of the Capper-Volstead Act makes illegal monopolization or restraint of trade by an agricultural marketing cooperative which results in undue price enhancement. Monopolization and restraint of trade are the principal acts prohibited by Sections 1 and 2 of the Sherman Act. This section examines the law relating to monopolization and restraint of trade. (For a much more extensive discussion, see (31).) Modifications of the general law by the Capper-Volstead Act will be treated in a later section.

In general, monopolization and restraint of trade involve different behavior, but restraint of trade may be the means to monopolizaton.

Monopolization

Section 2 of the Sherman Act makes it illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states . . . "

The Supreme court has defined monopolization in these terms:

> The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of the power as distinguished from growth and development as a consequence of a superior product, business acumen, or historic accident. (87)

Monopolization must involve acts, not merely the possession of a large market share.

> It has been recognized under the Sherman Act 'monopoly in the concrete' is not prohibited under the section . . . . The Act using the verb 'monopolize,' prohibits conduct rather than status. It is directed against activities rather than results. This is not a matter of semantics. It is a matter of facts. This is obvious from the fact [that] the statute carried criminal as well as civil sanctions. Thus, decisions recognized [that] the manner in which a monopoly position was obtained was a crucial consideration in determining whether or not a defendant has monopolized within the meaning of the Act. (Emphasis supplied). (85)

The prohibition in the Sherman Act does not make large size or market dominance, alone, illegal. They are clearly relevant evidence. The statute prohibits use of power to control prices or to exclude competitors from the market (52, 86, 87).

Court views on what constitutes monopolization have changed over the years. In 1920, the Supreme Court said in the U.S. Steel case, ". . . the law does not make mere size an offense or the existence of unexerted power an offense. It . . . requires overt acts . . . It does not compel competition nor require all that is possible" (93). Yet, Judge Hand's opinion in the Alcoa case 25 years later was that virtually anything done by a "monopolist," if it was done with intent to maintain a monopoly position which had been legally acquired (through patents), can be considered monopolization and therefore illegal (79). Alcoa was found guilty of competing too vigorously and successfully, excluding competitors by progressively embracing each new opportunity as it opened. 3/ But Judge Hand inserted a caveat

---

3/ The Court of Appeals for the Second Circuit was the court of final jurisdiction in this case. The Supreme Court lacking a quorum of six justices qualified to hear the case referred it to the Second Circuit. The decision of the Court of Appeals was later quoted with approval by the Supreme Court in the American Tobacco case (52).

that his doctrine does not apply to competitors in general. "The successful competitor, having been urged to compete, must not be turned away when he wins" (5, p. 430). As John M. Clark pointed out, the particular circumstances of the case were crucial. "The apparent harshness of the ruling appears to arise from grappling with the peculiar difficulties of this problem of transition from temporary innovational monopoly to competition" (9, p. 197).

Monopoly in Law and Economics

In economics, monopoly is defined as a 100 percent market share. Lesser market shares, though large, are defined in other terms...oligopoly being the most common. Not so in antitrust law. There, monopoly has been used to refer to almost any type of market structure involving a large firm. The nearest to a definitive statement is found in the Alcoa decision, which set the dividing line between permissible and suspect market shares somewhere between 64 and 90 percent: "Ninety percent is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three is not" (79).

In the American Tobacco decision, "over two-thirds of the entire domestic field of cigarettes, and...over 80 percent of the field of comparable cigarettes" was held to be "a substantial monopoly" (50). In the Grinnell case, having 87 percent of the business left "no doubt that the congeries of these defendants have monopoly power" (87).

Restraint of Trade

Section 1 of the Sherman Act makes illegal ". . . (e)very contract, combination in the form of trust or other wise, or conspiracy, in restraint of trade or commerce . . ." The language was drawn from the common law or at least from Senator Sherman's somewhat selective version of it (see footnote 2). It was left to the courts to determine in each case whether the particular contract or combination restrained trade.

A conspiracy is simply an illegal combination or agreement. Similarly, an agreement or contract is illegal if it restrains trade. Every contract or agreement has some effect upon trade, but only those where the effect is unreasonable or undue (as in the Supreme Court's definition, quoted below) are restraints of trade and therefore illegal.

Under the common law and the Sherman Act, restraint of trade by definition involved an agreement among two or more firms. Section 2 of the Capper-Volstead Act does not make the definition clear. It is at least possible that the proscription of trade practices of a single firm in the FTC and Clayton Acts could also constitute restraint of trade within the meaning of Section 2 of the Capper-Volstead Act.

A wide variety of conduct was potentially included under the prohibited restraints of trade, even though the effect of many such acts may be either benign or desirable. A standard of reasonableness was applied--the "rule of reason." The Supreme Court gave the classic statement of it in the Standard Oil case of 1911. "As the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Sherman Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, . . . the words as used in the statute were designed to have and did have a like significance." The language was "expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by light of reason, guided by the principles of law and the duty to imply and enforce the public policy embodied in the statute, in every given case where there is any particular act or contract within the comtemplation of the statute." (72)

In the American Tobacco case, the Court said, "as the statute had not defined the words restraint of trade, it became necessary to construe these words, a duty which could only be discharged by a resort to reason" (80). A District Court summarized this many years later by saying, "In effect, the word 'unreasonable' has been inserted by judical construction" (68), although Senator Sherman had clearly intended exactly that interpretation. As noted earlier, Senator Sherman intended to leave to the courts the definition of the boundary between legal and illegal combinations.

Thus, we see that the words "unduly" and "unreasonably" had the same meaning. Acts of monopolization or restraint of trade are acts which unduly restrict competition and were proscribed by the Sherman Act. When the Capper-Volstead Act was under consideration, it was easy to use the language of the conduct standards in formulating a performance standard and to make "undue price enhancement" the object of Section 2.

> The essential elements of an unreasonable restraint of trade or monopoly in violation of the Sherman Act are price control, production control and deterioration in quality. The fundamental test is a detriment to the public. (94)

Thus, there must be demonstrated a damage to the public interest, caused by the acts restraining trade. There are distinctions between (1) injury to competitors, (2) injury to competition, and (3) injury to the public interest. Injury to the public interest is essential to a finding of illegality--the others may or may not be present.

The harm to the public interest is presumed in acts which have been declared per se violations, including:

- Agreements between competitors to fix prices, allocate territory, boycott third parties; and

- Agreements between seller and buyer where the former ties a unique product or service to some other product or service, or where it controls the price or markets of commodities resold by the latter.

Similarly, transactions whose principal effect, regardless of their intended purpose, is to control prices or markets, are presumed to constitute illegal restraints of trade.

Restraint of trade may be found even in the absence of an explicit agreement. An implied conspiracy involving two or more parties has been found to violate the Sherman Act in some cases (57, 61) but not in at least one other (74).

Scope of the Capper-Volstead Exemption

There is general agreement that the exemption conferred by Section 1 of the Capper-Volstead Act and Section 6 of the Clayton Act is limited. The act of forming a cooperative is not a *per se* violation of the antitrust laws. The law will treat a cooperative meeting the requirements of Section 1 as a single legal entity. Thus, elimination of competition among producer members of an agricultral cooperative does not violate the antitrust laws (52, p. 35).

The House Committee Report on the Capper-Volstead Act stated:

> In the event that associations authorized by this bill do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by the law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them. (46, p. 3)

This view was restated by the Supreme Court in 1960. After giving the first sentence of the quotation above, the Court said:

> Although contrary inferences could be drawn from some parts of the legislative history, we are satisfied that the part of the House Committee Report just quoted correctly interpreted the Capper-Volstead Act, and that the Act did not leave co-operatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the co-operative.
>
> All that the Capper-Volstead Act and Section 6 of the Clayton Act intended was to authorize farmers to act together in cooperatives, like a corporation, within the framework of the antitrust laws (63, p. 467).

The analogy with a noncooperative corporation is limited. A noncooperative corporation is not an organization of businessmen who have pooled their business activities of production and distribution. It is an organization of investors who have pooled their funds so the corporation can engage in these activities. The farmer marketing cooperative, on the other hand, is an association of business firms (farmers) who have pooled their marketing activities but not their production activities. The circumstances and results are very different.

The Clayton Act exemption was held in an early case to mean "that organizations such as it described are not to be dissolved and broken up as illegal, nor held to be combinations in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations . . ." (88)

The Capper-Volstead Act was more specific as to the scope of the exemption than Section 6 of the Clayton Act which authorized "the existence and operation" of associations without capital stock and "lawfully carrying out the legitimate objects thereof." Capper-Volstead authorized "collectively processing, preparing for market, handling, and marketing" and included marketing agencies in common and necessary contracts and agreements as lawful means. Thus, the exemption conferred by Section 1 applies only to associations meeting the conditions stated therein and to activities covered by it.

Features of a Capper-Volstead Cooperative

To qualify under Section 1, a marketing cooperative (purchasing and most service cooperatives are not included) must conform to that section's conditions of membership, nonmember business, mutual benefit, and voting rights. Court cases have clarified the meaning of the Act on some of these conditions.

Membership in Cooperatives. The Capper-Volstead Act provides "that persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations. . ." The second part of the sentence starting "as farmers" was intended by the Congress, and has been interpreted by the courts, to qualify the earlier part. A cooperative marketing association must be composed only of "persons" who are both producers of agricultural products and farmers. The "persons" may be either natural persons, partnerships, or corporations (55). Unincorporated associations or joint ventures of farmers probably are also included.

The Supreme Court held in the second Sunkist case (55) that all of the members of the Capper-Volstead cooperative must be producers of agricultural products. At that time, 15 percent of the local packinghouse members of Sunkist were not cooperatives and not engaged in the production of citrus fruit. The Court held that the act ". . . was designed to insure that qualifying associations be truly organized and controlled by and for producers" (55, p. 394). "We think that the Congress did not intend to allow an organization with . . . nonproducer interests to avail itself of the Capper-Volstead exemption" (55, p. 396). This principle was reaffirmed by the Supreme Court in the National Broiler Marketing Association case (91).

In that case, the Supreme Court addressed for the first time the question of who is both a producer of agricultural products and a farmer within the meaning of Section 1. The case involved the claim of the National Broiler Marketing Association that it was a cooperative marketing association composed of producers of broilers, an agricultural product.

NBMA was composed of integrated broiler firms, most of whom slaughtered (processed) broilers which were grown under contract. The decision addressed the meaning of the phrase "as farmers" when used as a modifier to "persons engaged in the production of agricultural products." The court held that:

> . . . a commonsense reading of this language clearly leads one to conclude that not all persons engaged in the production of agricultural products are entitled to join together and to obtain and enjoy the Act's benefits: The quoted phrase restricts and limits the broader preceding phrase 'persons engaged in the production of agricultural products.' The Congressional debates demonstrate that the act was meant to aid not the full spectrum of the agricultural sector, but instead, to aid only those whose economic position rendered them comparatively helpless. . . .
>
> Several attempts were made to amend the act so that certain processors who, according to preplanting contracts, paid growers amounts based on the market price of processed goods [were covered]; these attempts were roundly rejected. Clearly, Congress did not intend to extend the benefits of the Act to the processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk.
>
> . . . any member of NBMA that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act. The economic role of such a member in the production of broiler chickens is indistinguishable from that of the processor who enters into a preplanting contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops. Their participation involved only the kind of investment that Congress clearly did not intend to protect. We hold that such members are not 'farmers,' as that term is used in the Act, and that a cooperative organization that includes them--or even one of them--as members is not entitled to the limited protection of the Capper-Volstead Act. (91) (Emphasis added.)

The courts have held that the listing of types of agricultural producers in Section 1 does not exclude other, unlisted types. Egg producers, who are not specifically mentioned, have been held to be within the terms of the Act (78).

The legislative history of the Capper-Volstead Act makes clear that Congress intended to limit the meaning of "producers of agricultural products" to those processes which involve growth and harvesting of crops and husbandry of animals. During the consideration of the bills which eventually became the Capper-Volstead Act over the course of several years, Senator Phipps of Colorado several times introduced an amendment which would have defined as "producers of agricultural products" both farmers and processors of products "when the price paid by the manufacturer to the producer . . . is controlled by or dependent upon the prices received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product . . ." His intention was to include processors who entered into preplanting contracts with price to be determined on what amounted to a profit-sharing basis between processor and producers (45, pp. 2,273-4). The amendment was rejected each time it was offered. Thus, while the operations of processors are clearly production in economic terms, those operations are not included in farming in terms of Section 1.

Thus, when all of the functions of farm production are performed by one "person," that person is a producer within the meaning of Section 1. A corporation which owns and operates its own farm to produce an agricultural product and which also owns and operates a processing plant can be a member of an agricultural cooperative qualified under the Capper-Volstead Act. Its activities as a farmer-producer would fall within the exemption of the Act but its activities as a processor would not.

The remaining question, which has not been dealt with by the Supreme Court, is, What specific functions within agricultural production must be performed by a "person" in order to qualify that "person" as a farmer? The Court seems to hold, in the specific case of broiler integrators, that a farmer must also be a landowner. It seems unlikely that the Court would hold that one who performed all of the functions of an agricultural producer except ownership of land and buildings--i.e., a cash renter--plus nonfarm functions such as processing or input supply would not be a farmer within the meaning of the Act. But the meaning of the law in such a case is yet to be decided.

Some interesting questions as to the meaning of the language of Capper-Volstead have arisen with developments in agricultural production since 1922. Livestock production has been subdivided into several phases, notably the separation of cattle feeding from the cow-calf operation. With feeding conducted in large commercial feedlots, clearly there is a significant difference from the humble cattleman whose protection was proclaimed by the 1922 proponents of Act. Yet large ranchers with many thousand head of cattle were protected. Thus, there seems to be no reason to conclude that the owner/operators of commercial cattle feedlots are not producers of agricultural products as farmers or ranchers within the meaning of Section 1 of the Capper-Volstead Act.

Nonmember Business. Products handled by a cooperative for nonmembers must not exceed in value the products handled for members. The products handled for members must have been actually produced by members. (This includes those produced on crop-share leases.) Commodities purchased by members and delivered to an association constitute nonmember business.

Mutuality. The association must be operated for the mutual benefit of its members. In brief, the mutuality concept means that risks, costs, and benefits must be shared equitably among members.

Generally speaking, an agricultural marketing cooperative is operated for the mutual benefit of its members when no persons other than members and other patrons share in the net margins and it is under the control of its members. The members of an association are in control when they direct the affairs of the association through a representative board of directors which operates free of outside influence or pressure.

Voting Rights. Associations must conform to one or both of the following requirements:

- No member may have more than one vote because of the amount of stock or membership capital owned.
- Dividends on stock or membership capital cannot exceed 8 percent per year.

This does not require one member, one vote, as is often concluded. Any equitable arrangement not based on stock or membership capital is permissible, including a voting method based on patronage.

Activities Within the Exemption

This section discusses specific activities of agricultural cooperatives that may be within the scope of the Section 1 exemption, that is, with activities that might be challenged as violations of the antitrust laws if engaged in by a noncooperative business. It deals only incidentally if at all with activities which do not violate the antitrust laws regardless of the type of firm. It also distinguishes certain activities of cooperatives which are usually within the exemption but which are moved outside its scope under specified circumstances.

The Department of Justice summarized some of the activities of cooperatives which it felt were within the scope of the exemption in a 1979 brief:

> . . . it is clear that the exemption provided by section 1 of Capper-Volstead and section 6 of the Clayton Act extends not only to the formation of a cooperative but also to:
>
> The achievement of monopoly power by the cooperative through natural growth--i.e., through the voluntary

addition of members to the cooperative or through mergers between producer cooperatives;

The elimination of competition among members of the cooperative in setting the price for and conditions of marketing of their products; and

Vertical expansion of the cooperative into processing, packaging or other activities relating to the marketing of its members' products by legitimate means (for example, the opening of a packaging plant by a producer cooperative). (53, p. 36)

The courts have made clear that combinations or conspiracies in restraint of trade which involve noncooperative firms are forbidden.

> . . . with respect to activities outside the scope of Section 1, cooperatives are subject to the same anti-trust enforcement authorities as are all other business organizations. Just as cooperatives are not immunized from the Sherman and Clayton Acts with respect to activities outside the scope of Section 1 of Capper-Volstead, neither are they immunized from the reach of the FTC Act with respect to such activities. The antitrust laws may be enforced against restraints of trade not immunized by Section 1 of Capper-Volstead, even if those restraints of trade do not unduly enhance price. (52, p. 37)

Bargaining. There is a long-standing disagreement as to whether the term "marketing" as used in the Capper-Volstead Act includes bargaining with buyers over price--in other words, Is a pure bargaining association an exempt Capper-Volstead marketing cooperative?

At least one of the framers of the Act appears to have had no such doubts. In discussing the bill in January 1920, Senator Capper said:

> Individually, farmers are powerless to cope with the great organizations with whom they must deal. They must either bargain collectively or not bargain at all. They must either have the right to bargain collectively or they must accept the prices offered them individually by the middlemen engaged in processing and distributing.
>
> Organized farmers with undoubted right to bargain collectively would still be at a disadvantage in dealing with these powerful organizations of middlemen. But the right and the clear right to bargain collectively should be given them, else they cannot operate successfully, and therefore cannot survive. (44)

The Antitrust Division view (in 1974 before the Treasure Valley decision) was:

> Clearly Capper-Volstead permits price fixing and related activities that would otherwise violate the antitrust laws. But the antitrust exemption conferred by this statute is not absolute and certain activities of the cooperative may either destroy the exemption or go beyond the shelter it provides. Immunities of this sort are strictly construed.
>
> I think it should be stressed that, as you may recall, the Capper-Volstead Act provides that producers may "act together in association, cooperative or otherwise . . ." for the purpose of "collectively processing . . . handling and marketing their products . . ." In the antitrust division, we tend to read this narrowly and the courts have generally agreed with us. Thus we understand the word "producer" to refer to actual farmers, and we also read the act to cover only associations that actually perform processing, handling, and marketing functions. An association that does not do these things is not a Capper-Volstead association. This suggests that bargaining associations that perform only bargaining services and leave the actual processing, handling, and marketing to individual members may not come within the act.
>
> Nevertheless, as I have indicated earlier, this is not to say that all farm bargaining associations are unlawful. It is only to suggest that many probably do not enjoy Capper-Volstead immunity. (10, p. 72)

The Ninth Circuit Court of Appeals held that bargaining was indeed marketing. The Supreme Court has never explicity considered the point, although it did refuse to review the Circuit Court decision. The Ninth Circuit Court said:

> The two associations were in fact "Malheur Potato Bargaining Association" and "Treasure Valley Potato Bargaining Association. (Emphasis added.) Their principal function was to bargain collectively for their respective members as to prices, terms, and conditions of preseason potato contracts. They 'coordinated their bargaining efforts' and tacitly attempted to secure similar contracts from both associations so that their members would be treated similarly regardless of the defendant-processor to whom they sold their potatoes.
>
> We think the term marketing is far broader than the word sell. A common definition of 'marketing' is this: The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk

> bearing, and supplying market information.' Webster's New Collegiate Dictionary, 1953 Edition. (Emphasis added.) The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing 'marketing' functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act. (76)

The Federal Trade Commission agreed with the Court (98), although some of its staff disagreed, arguing that a cooperative must perform all of the elements of the marketing function in order to qualify under Capper-Volstead (12, pp. 40-42).

A district court has held that a marketing agency in common which "does nothing but coordinate the price-fixing activities of its member cooperatives" is immunized by the Capper-Volstead Act from attack under Section 1 of the Sherman Act (56).

Setting Prices. The scope of the exemption as applied to questions of the fixing of prices was spelled out in at least one regard in the Central California Lettuce Producers Cooperative case. The FTC had charged that the members of the Cooperative were "illegally agreeing among themselves on the prices at which Central's members would sell the lettuce they produce." The cooperative itself did not physically handle the lettuce nor actually make sales, but rather it served as a forum to establish a price range within which its members would individually sell their crops.

The FTC found that a cooperative is not required to perform all of the functions enumerated in the Capper-Volstead Act to fall within the scope of the exemption. It said, "whatever marketing activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale" (97).

In a private suit concerning the same issue, a judge of the U.S. District Court in San Francisco found:

> I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, their cooperative would clearly be entitled to an exemption. (67, p. 992; affirmed by the Circuit Court)

Similarly, lower courts have held that two or more agricultural cooperatives may jointly establish prices of their products, even though they have not established a formal marketing agency in common. Those meeting to fix prices must be only cooperatives or members of cooperatives (56, 76, 89). Some FTC staff have disagreed with the opinion, holding that such joint price setting constitutes illegal price fixing (12, p. 43).

Marketing Agencies in Common. Section 1 specifically authorizes marketing cooperatives to have marketing agencies in common and the Cooperative Marketing Act of 1926 authorized cooperative associations of producers to ". . . acquire, exchange, interpret and disseminate past, present and prospective . . . market . . . information by direct exchange between such persons and/or such associations or federations thereof, and by and through a common agent created or selected by them."

Until recently there was no question that, where a formally organized agency existed--whether called a marketing agency in common, sales agency, or a federation--its activities fell within the scope of the Section 1 exemption. The FTC, which in 1968 felt that there was "immunity from the antitrust laws insofar as collaboration among members of agricultural cooperative associations and their selected marketing agencies are concerned" (98), by 1975 began to recede from that opinion. In 1975 and again in 1977, the FTC staff took the position that the marketing-agencies-in-common provision was "only meant to legalize the device itself, and not its use in any and all circumstances" (23, p. 77). The Antitrust Division of the Justice Department, in its Report on Milk Marketing, held that agricultural cooperatives operating through marketing agencies in common may agree among themselves "on all aspects of marketing . . . including price and covert bid rigging . . ." (38, p. 207), although this logic did not govern when the Antitrust Division attacked participation in the Associated Reserve Standby Pool by large regional dairy cooperatives as being anticompetitive.

Questions as to whether or not cooperatives can jointly fix prices, without the existence of a formal marketing agency in common, have been dealt with by the courts. The Supreme Court held in the first Sunkist case that three legally separate cooperative organizations with common membership could not be held to have conspired with each other to fix prices, since the members could have formed one organization rather than three (73).

The Ninth Circuit Court held in the Treasure Valley case that two separate bargaining associations could agree upon the price which the members of each were to receive for their potatoes (76). Relying on the principle enunciated by the Supreme Court in the Sunkist case, the Court of Appeals held that, in the absence of predatory conduct and where the two associations could have formed a single association to market an agricultural product, mere organizational distinctions should be ignored.

Mergers and Acquisitions. Mergers with and acquistions of noncooperative firms by cooperatives are not within the scope of the Section 1 exemption and have been challenged, like those involving two noncooperative firms, on anticompetitive grounds. Where predatory action or intent is involved in such a merger, it can be prevented or overturned. A merger "to restrain and suppress competitors and competition" is illegal, but an acquisition "simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act" (64, p. 471-2).

Mergers between cooperatives have been regarded as immune from the antitrust laws (38, p. 206; 35, pp. 453, 460; 3, p. 391). No such merger has ever been challenged by the antitrust agencies. The Antitrust Division would like to apply the "completely voluntary membership" principle here, too, and has insisted that members be allowed to withdraw at the time of the merger (37, p. 74; 10, p. 72; 12).

Membership Contracts and Agreements. Clearly contracts between the cooperative and its individual members are among the "necessary contracts and agreements" mentioned in Section 1. Such contracts spell out the relationships between the cooperative organization and its members, including the rights and duties of each.

The question of whether a cooperative can choose its members has never been dealt with by the Supreme Court. During consideration of the final bill, Senator Walsh proposed an amendment: "That any person engaged in the same industry shall be admitted to membership on equal terms with all others" (45, pp. 2,267-8). This would have given universal cachet to a rule of open membership. The amendment was rejected by the Senate.

The only aspect of the membership question which has been dealt with by the courts is that of coerced membership. In a fishermen's cooperative case, the Supreme Court held that the cooperative could not require its buyers to agree to buy only from the cooperative members, since that would force all fishermen to join the cooperative (60). While this case does not concern an agricultural cooperative, it is often cited as relevant because the Fisherman's Collective Marketing Act is virtually identical to the Capper-Volstead Act.

Limiting Production or Marketing. The question of whether efforts by a marketing cooperative to restrict the volume produced or marketed by its members, through quotas or other means, is a legal activity within the scope of the Section 1 exemption has never come before the courts. In a parallel case under the Fisherman's Collective Marketing Act, the FTC found in 1964 that voluntary agreements among the members of the cooperative to limit production were exempt from antitrust liability (96). However, more recently the FTC in clearing joint price fixing by California lettuce growers, said that if production control had been involved it would probably have been illegal (97).

Full Supply Contracts. Full supply contracts, in which the seller agrees to supply all the needs of the customer for the product in question, are generally legal both for cooperatives and noncooperatives. But intent is crucial. "Full supply contracts are illegal when made for the purpose of eliminating and suppressing competition" (65, see also 62).

This is, in fact, a general statement which can be applied to contracts and agreements. The "legitimate objects" of cooperatives generally do not include injury to competition, although the circumstances of each individual case would have to be examined to determine whether such an injury to competition (in the broad, public interest meaning--see discussion on page 11) has occurred.

Cooperative Monopoly. The weight of opinion is that the mere existence of a cooperative monopoly is not illegal, if it acquired that position through natural growth, that is, by attracting members without coercion or predatory acts. Several District Courts have taken such a position. The Oregon District Court said:

> A farmers' cooperative association, acting alone and not in concert with others, is exempt from prosecution under the antitrust laws, even though it becomes monopolistic. (84)

In his charge to the Jury, Judge Wyzanski said:

> It is not a violation of the Sherman Act or any other antitrust act for a Capper-Volstead cooperative to acquire a large, even a 100 per cent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling.
>
> On the other hand, it would be a violation of the law, and it would be a prohibited monopolization, for a person or group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, or through a predatory practice, or through the bad faith use of otherwise legitimate devices.
>
> It would be a 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.
>
> That is to say, it would be unlawful for a group of persons to agree to take steps which were directed at excluding actual or potential competition with the intent of accomplishing that particular result, rather than with the intent of doing something innocent to further their general credit, banking, or like policies. (54)

Thus, Judge Wyzanski was applying the case law dealing with monopolization to the cooperative--the existence of a cooperative monopoly is not illegal if that status was not acquired by anticompetitive means and monopoly power is not used to exclude actual or potential competition. The Court of Appeals for the Second Circuit reached the same conclusion in 1980 (56).

In upholding the legality of a Federal milk order against the claim that its adoption would enable a cooperative to monopolize the market, the Supreme Court said in 1939:

> If ulterior motives of corporate aggrandizement stimulate the cooperatives' activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effort would be to give a cooperative a monopoly of the market would not violate the Sherman Act. (92)

The Supreme Court has not ruled on this point in a case not involving a market order. In discussing the Maryland and Virginia case, FTC Commissioner McIntyre said:

> . . . the Court did not rule, and had no occasion for ruling, that a cooperative may not obtain complete monopoly power in the economic sense as long as it does so solely through those steps involving cooperative purchasing and selling unaccompanied by predatory practices or bad faith use of otherwise legitimate devices. (25, p. 27)

The Court of Appeals said, in the Sunkist case:

> It is difficult for this Court to see how a monopolist can make any business decision without its involving and using its monopoly power, nor how it can make any sale or purchase (for example) at an advantageous price, without gaining some competitive advantage. (95)

In the view of one commentor:

> . . . while mergers of cooperatives are not subject to the antitrust laws, the 'single firm conduct' of the resulting organization will be. This apparently anomalous result is accepted without much analysis by most of the commentators in this area, and by the courts as well.
>
> If it is legal to form a cooperative which may have a monopoly of certain products in the relevant market, it ought not be illegal for the cooperative, once formed,to enjoy the results of that monopoly. However, this does not seem to be the state of the law today. (28, p. 143)

Thus, a cooperative monopolist is in essentially the same position with regard to possible acts constituting monopolization as is a noncooperative firm with a legally acquired monopoly. The last statement of the Supreme Court on what is permitted conduct for such a firm in the Grinnell case (see page 9), was somewhat less than definitive. In recent years, the Circuit Courts have been formulating conduct standards addressing the question of what business practices which are legal for other firms are also permitted for a corporation with a legally acquired monopoly.

In pricing, "courts now appear to be willing to allow legal monopolists to compete on an equal basis with competitors . . . while safeguarding against unreasonable practice" (22). Attempts to require such monopolists to disclose in advance new products they intend to introduce have been rejected by several courts. But market actions that a firm without market control would find substantially less effective or counterproductive are considered monopolistic and not permitted. Thus, by legally obtaining market control ("monopoly"), the firm does not acquire the right to destroy its competitors (see 22).

Predatory Practices and Restraint of Trade. Combinations or conspiracies with noncooperative firms are not within the Section 1 exemption and can be challenged as they would be if done by any other firm. Predatory practices, coercion, and unfair trade practices which monopolize or restrain trade are also outside the Section 1 exemption. Among those specifically dealt with by the courts are:

- Secondary boycotts (88),
- Price fixing with noncooperatives (82),
- Agreements not to sell to a particular person (73),
- Attempts to control resale prices of a customer (53, 90).

Undue Price Enhancement

The intent of the Capper-Volstead Act clearly was to make it possible for farmers to enhance prices through marketing cooperatives. Section 2 says that they cannot go too far and unduly enhance prices through monopolization or restraint of trade.

The Act did not define undue price enhancement. The sponsors contemplated that it would be assessed by application of the rule of reason, like restraint of trade or monopolization. In response to a question as to how the Secretary of Agriculture was to decide if prices in a particular case were unduly enhanced, Senator Lenroot replied during the debates:

> There is nothing more vague or more indefinite in the term 'undue enhancement of prices' than there is in the term 'undue restraint of trade.' One is just as shadowy as the other. (45, p. 2,221)

An almost identical problem arises in private-party suits for treble damages under Section 4 of the Clayton Act (which superseded Section 7 of the Sherman Act). 4/ In such cases, a plaintiff who can prove to the satisfaction of the court that the defendant violated the antitrust laws through actions such as price fixing, refusal to deal, or monopolization is entitled to recover treble damages. The usual measure of damages is the illegal overcharge, the difference between the illegally enhanced price and the price that would have prevailed in the absence of the illegal conduct (17, p. 751). In private party suits, the bottom line is measuring to the satisfaction of the court the damages incurred by the plaintiff. This involves many analytical problems which do not arise in an undue price enhancement case where the only remedy available to the Secretary under the Capper-Volstead Act is to order the cooperative to cease and desist from the illegal monopolization or restraint of trade.

Methods of measurement used in such private party actions have been of three types: (1) comparisons of prices or profits in periods with and without the illegal activity; (2) the "yardstick" approach where prices or profits are compared with those of another firm which was not the victim of such illegal conduct; and (3) multiple regression analysis using dummy variables to represent the illegal activity--the coefficients of the dummy variables are used as a measure of the effect of the illegal activity on prices or profits.

WORKABLE COMPETITION IN TODAY'S MARKETS

Section 2 of the Capper-Volstead Act requires the Secretary of Agriculture to restrain marketing cooperatives from unduly enhancing prices through monopolization and restraint of trade. Yet, as the previous discussion documented, what constitutes monopolization and restraint of trade is far from settled.

This section will suggest that a basis for making these determinations can be found by applying the principle that cooperatives should be allowed to participate in the economy as fully as noncooperative firms. In other words, equity suggests that the competitive leeway allowed cooperatives should be equivalent to that allowed to noncooperative firms. First, we will consider the competitive pressures of the contemporary food sector of the U.S. economy. Then we will examine a theory of workable competition as an alternative to several other competitive theories applied to cooperatives.

The Modern American Economy

The modern American economy is first and foremost a consumer economy. In the aggregate, consumers are affluent, although poverty persists at the lower end of the scale. The transition from a subsistence economy has been going on for a long time, but the rate of change increased dramatically after the end of World War II.

4/ I am indebted to James Baarda for calling this point to my attention.

The food sector is no exception. American consumers are eating a little less food per person but, with increased incomes, they are buying more expensive foods. Comparing total food expenditures with the cost of the three different food plans developed by the USDA's Human Nutrition Information Service provides a comparison of the amounts that consumers and the entire society decide to spend for food with standards representing the costs of fixed quantities of food at three different levels. Aggregating the cost of each food plan for the population of 1960 and that of 1976 shows that, in 1960, actual expenditures for food (with all food at retail store prices, as it is in the USDA food plans) were almost exactly the same as the aggregate cost of the moderate-cost food plan. By 1976, actual expenditures had risen well above the level of the moderate-cost food plan. They had moved 42 percent of the distance from the moderate-cost food plan to the liberal food plan.

Thus, we see that, while consumers on the average were well beyond the subsistence level in 1960, in the next 16 years they had moved significantly toward good eating. In addition to the shift shown by this comparison, they were also eating a significantly larger share of their meals away from home at substantially higher cost.

The industrial side of the modern American economy is characterized by large-scale corporate economic units. The 100 largest food and tobacco processing companies accounted for 52.5 percent of U.S. shipments of food and tobacco products in 1975. Another 100 companies accounted for an additional 11 percent (11, p. 68). These 200 companies are broadly diversified. U.S. sales of processed foods, alcoholic beverages, and tobacco made up only 52 percent of their business.

In a consumer economy, the outputs of U.S. food manufacturers are either consumer food products or intermediate products used in their manufacture. Consumer food products are largely branded, many with strong brands that differentiate them from others. Manufacturers engage in a continual process of new product development and promotion. Product development must be a continuous process if manufacturers are to maintain or improve their position in the marketplace. Consumers identify processed food products very largely by brand, although a very few are also quality-graded by the U.S. Department of Agriculture. Some of the brands belong to retailers or wholesalers, but the great majority are processor brands. Branding provides the basis for consumer identification of packaged food products and helps food manufacturers to differentiate their products from those of other manufacturers. Constant attention to product development and differentiation provides a food manufacturer with a partially protected place in the market with somewhat higher returns.

The imperative of the modern large, publicly held corporation is growth. Time was when a modest growth in sales--keeping up with or slightly exceeding the industry average--and a respectable profit rate was enough to satisfy the stockholders, "most of (whom) took a relatively disinterested view of their company so long as it paid dividends regularly, did not go broke, and the management gave evidence of being reasonably alert" (18, p. 61). No longer so. Nowadays, a majority of all stock is held in great blocks by institutional investors--mutual funds, trust funds, and investment funds (18, p. 61). Over a third of all common stocks are held by private pension funds (14). The standards by which these large institutional investors, securities analysts, and increasingly the remaining individual stockholders judge corporate performance are much different and much tougher. "The future value of the securities they own, which stocks to buy and which to sell, and whether a given company (is) moving or standing still are the criteria by which these institutional owners of securities judge corporations in these times" (18, p. 61).

The effect of tax laws is even more serious:

> . . . through the combined working of the corporation income tax and capital gains tax, the system greatly favors short-term, immediate gains and makes long-term investments in an uncertain future unattractive and unrewarding.
>
> Tax laws and regulations also push industry away from a technology focus and toward financial conglomeration. Under the tax laws of the United States--laws which in this form do not exist in many countries--the proceeds of liquidating yesterday are considered profit and taxed as such both to the company and to the investor. Hence, businesses, instead of liquidating the obsolete, have to find new investments in new businesses for whatever cash is being released by the shrinkage of an old technology, an old product line, or an old market. And this, in effect, imposes conglomeration on them. This policy makes it increasingly difficult to shift resources from low and diminishing areas of productivity to areas of high and increasing productivity and this impedes innovation; it also shifts businesses from a technological to a financial focus. It makes management increasingly a matter of finding the right financial investment. (15, p. 807; see also 7, p. 85)

The balance between purely financial and "real" (technological, productive) considerations in corporate planning and investment is more and more shifted toward the financial side by the operation of the tax laws.

The Terms of Reference for Cooperatives

Agricultural marketing cooperatives must operate in the modern American economy. Within the broad and rather ill-defined limits of the antitrust law, USDA policy in enforcing Section 2 of the Capper-Volstead Act can have significant impacts on how fully marketing cooperatives can participate in the food sector. The polar extremes in viewpoint are provided by the Sapiro movement of the twenties and the "small is beautiful" movement of the seventies.

The monopoly cooperative program stemmed from the ideas of Aaron Sapiro, a California lawyer. He had been the attorney for several California cooperatives of specialty products. He believed that their principles could be applied to the great staple crops on a nationwide basis. He advocated strong centralized cooperatives, handling at least 90 percent of the national production. Binding membership contracts extending over a period of years were to provide an assurance of volume (subject to the vagaries of the weather, of course). The membership contracts were also the basis for obtaining financing on a larger scale and over a period of years. Cooperatives were to move on from shipping point to take over many of the activities in centralized markets. Control of nearly all of the sales (if not of the volume produced) provided the basis for a change in pricing methods. The cooperative would assess the national supply and demand situation, set a commodity's price, and remove enough from the market (by export or other means) to make the price effective. Thus, Sapiro envisioned applying to the marketing of agricultural commodities many of the techniques used by industrial corporations (2, pp. 195-8).

At the other pole is the "small is beautiful" view of cooperatives. It appears to have arisen in part from an ideological preference for atomistic competition. Since in the United States something approaching that state is found only in farming, the idea appears to be to preserve small-scale agriculture and small cooperatives to complement it. It may also draw something from the 1844 Rochdale idea of a small, democratically controlled, local consumer cooperative. In the seventies, it found a home in the staffs of the antitrust agencies and expression in their reports and that of the National Commission for the Review of Antitrust Laws and Procedures (23, 29, 38). In that view, cooperatives should have only the right to organize and to exist. All other activities would be subject to the antitrust laws, as with any other organization. Membership would be entirely voluntary with no constraints on entering or leaving. Mergers between cooperatives would be subject to the same *per se* prohibition which applies to all other corporations of any size. Two cooperatives could not discuss prices without being accused of price-fixing. Market share would be regarded as a measure of market power without consideration of differences between cooperatives and other organizations. The cooperative would have no market power and would have no means of acquiring any.

These polar views of what cooperatives should resemble have their counterparts for the general economy--roughly speaking "big business is undoubtedly beneficial" and "strive for perfect competition."

However, the effective antitrust policy for the overall economy in the United States is now one of workable competition, regardless of the rhetoric heard from time to time. This policy recognizes the impossibility of the atomistic or perfect competition model and the unacceptability of a policy which allows excessive market power. It implicitly recognizes the characteristics of the modern economy discussed at the beginning of this section and tries to deal with the problem of competition within that context. The concept of workable or effective competition is based on rejection of the ideal of perfect competition as the end toward which to strive. This rejection is based both on the impossibility of achieving perfect competition (upon which nearly all are agreed), or even of moving very far in that direction (upon which there is less consensus), and on a preference for the imperfectly competitive mixed economy which we have, largely due to its dynamic quality. As a policy stance, it says that, because it works, what we have, warts and all, is preferable to the unattainable ideal of textbook perfect competition. That is not to say that it cannot work better. This approach accepts as given the basic characteristics of the modern economy which have been discussed and does not attempt to roll back to a state which never existed in the first place. At the same time, it constantly asks: Are there ways in which the performance of that economy can be improved?

In considering cooperative policy, the variety of activities of marketing cooperatives are better understood by recognizing the major types of cooperative strategies. There are six major classifications and many possible combinations (see also 21, pp. 301-2). Each major type reflects a different marketing strategy.

1. Bargaining. The cooperative negotiates contract terms with the first handler or processor but does not take title to the product. Once the umbrella contract terms are determined, each producer has the option of signing the contract on those terms with the handler or processor.

2. Competitive buy-sell. Such a cooperative acts as a competitor in the spot or cash market. Cooperative members are not under obligation to sell through the cooperative. The cooperative may or may not take title to the product. Examples include a country grain elevator. The producer selects the time of sale and receives the price at that time.

3. Committed bargaining. Producers commit themselves to sell only through the bargaining cooperative, which may or may not take title. The cooperative may perform other functions such as assembly and routing of milk.

4. Sales facilitating. The cooperative assists in selling but does not take title, as a country livestock auction, terminal market commission cooperative, or an electronic auction.

5. Committed commodity marketing. Producers turn over to the cooperative the entire marketing function by means of a marketing agreement. The producer receives payment on a pooled basis with appropriate quality or other price differentials. The cooperative takes an

active role in pricing and in selling the product. It may arrange for utilization of product in secondary uses in order to protect the primary market. Export sales or industrial uses may constitute such secondary uses.

6. Committed integrated marketing. These are cooperatives which have integrated one stage further than the committed marketing cooperative. Many process or package consumer products, selling under their own brands or under retailer labels. Many such cooperatives are active in export markets.

One must not confuse the cooperative with its members. A cooperative is usually, but not always, a corporation. It has a life of its own--an existence--separate from its members, just as a corporation has an existence apart from its stockholders. In each case, both sets of economic units are necessary to the existence of the corporate entity, but the cooperative and its members are no more one than are the corporation and its stockholders.

The cooperative is not the agent of each individual farmer-member, although it is clearly acting in the collective interest of its members. Typically, the cooperative enters into a legally binding contract with each individual member which specifies the rights and responsibilities of each party. The contract makes each producer a member of the cooperative and specifies how the relationships between the two independent economic entities are to be conducted. A marketing contract specifies that each farmer-member turns over to the cooperative the function of marketing the farmer's produce under conditions specified in the contract and subject to the direction of the farmer-membership acting through the elected board of directors.

A BASIS FOR POLICY REGARDING COOPERATIVE ACTIVITIES

Within the broad framework of the preceding section, the following is an effort to put in perspective a possible USDA policy toward cooperative activities. Its first premise is that agricultural marketing cooperatives should be permitted to participate fully in the modern American economy--i.e., that cooperatives should not be subject to greater limitations on their activities than other firms after allowance is made for differences between them. This qualification is of crucial importance, since the same treatment of unequal persons or firms does not yield equitable results.

Second, the partial exemption provided marketing cooperatives recognizes real differences, not just between unorganized producers and the buyers they face, but also between the bases for market power of cooperatives and buying firms.

Third, public policy is to allow cooperatives to acquire market power, subject to constraints on undue price enhancement resulting from acts which constitute monopolization and restraint of trade, or from predatory acts.

In attempting to sketch out a feasible policy regarding cooperative form and activities, there seem to be few alternatives to one based on a theme of workable competition. Such a policy must recognize the legislative intent embodied in the Capper-Volstead Act and a number of more recent statutes (reaffirmed in the FTC Authorization Act of 1980) to allow and encourage enhanced market power on the part of marketing cooperatives but to set limits on uses of that market power in terms of undue price enhancement. The objective of permitting marketing cooperatives to make use of many of the advantages of a business corporation also is important. In looking at policy regarding specific activities of marketing cooperatives, one appropriate question is: If a noncooperative corporation can utilize such a practice, is there any reason why a cooperative cannot?

The proposals advanced in this section grow out of four propositions:

(1) Undue price enhancement by an agricultural marketing cooperative is possible, although unlikely. The likeliest possibility would arise with a strong cooperative having effective control over 100 percent of the volume of an agricultural product which had few or no close substitutes. Such a hypothetical cooperative would find itself in a situation analogous to Alcoa and, assuming that it had arrived in such a monopoly situation through the voluntary actions of its members (i.e., no monopolization in the acquisition of power), activities using its market power which resulted in undue price enhancement likely would be considered to constitute monopolization, as in the Alcoa case. It would also be possible for a monopoly cooperative to unduly enhance prices through activities which constitute monopolization or, especially, restraints of trade in the more usual sense.

(2) The basis of cooperative market power is significantly different from that of a nonmembership corporation. Therefore, market power cannot be equated with market share in the same way for the two types of firms.

(3) The full range of activities permitted to non-cooperatives should be available to agricultural marketing cooperatives.

(4) Efficient operation of the economic system and justice to its participants require both public agencies and those who would influence them to clarify, insofar as possible, the rules of the game. The objective is to limit litigation to the minimum necessary to make the system work more efficiently and equitably.

The effects of many of these practices would be different in the case of a cooperative monopoly from those where the cooperative(s) competed with other sellers. Therefore, possible policy regarding a number of cooperative activities will first be discussed excluding the case of cooperative monopoly and then, in the final section, including it.

In the following discussion, activities characterized as "completely within the Section 1 exemption" or "within the exemption" are considered to be immune from challenge under the antitrust laws when taken alone. These activities would not be regarded as monopolization or restraint of trade in dealing with a possible violation of Section 2 of the Capper-Volstead Act. Cooperative activities not within the Section 1 exemption are subject to the same antitrust law as are similar activities of noncooperative firms.

Membership

All members of an agricultural marketing cooperative must be producers of agricultural products who are farmers. These are functional terms: a "person"--individual proprietor, partnership, corporation, unincorporated association, or joint venture--who performs the functions of growing crops or husbandry of animals is a producer. Such a "person" may perform other functions--for example, processing--but those activities are not within the scope of the Section 1 exemption.

Land ownership should not be a requirement for qualification as an agricultural producer. A cash renter or a tenant or one who produces on a crop-share lease is a producer and farmer.

Size of operation is not a consideration. The concern of Congress with assisting farmers with relatively little market power does not limit cooperative membership to small farmers, however size is defined, as all farmers were seen as relatively powerless in dealing with buyers, a condition which still generally prevails.

Contract production does not make the contractor a farmer-producer, even though the contractor clearly has assumed some of the risks of agricultural production. The refusal of the Senate to include such contractors within the scope of the Capper-Volstead Act is indication of congressional intent. While it might be argued that such contractors are producers, they cannot be regarded as farmers. Similar reasoning would also be applied to landlords and investors in agricultural production.

Bargaining

Bargaining is one of the functions of marketing. A marketing cooperative can perform one or more of the marketing functions and qualify as a Capper-Volstead cooperative. A complete catalogue of all of the elements of the marketing function would include several score items. Yet few if any firms--cooperative or otherwise--perform all of those activities. Each firm selects the appropriate subset for its own circumstances. Yet they all engage in marketing. Common sense rejects any other interpretation.

Setting Prices

The act of setting prices should be regarded as an essential part of the marketing function and central to the exemption provided by Section 1 of the Capper-Volstead Act. As long as it involves only cooperatives and their members, joint price setting is completely within the scope of the exemption.

Marketing Agencies in Common

Marketing agencies in common consisting solely of cooperatives should be considered completely within the Section 1 exemption. This includes federations and other organizational forms, regardless of the label. This means that marketing agencies in common, sales agencies, and federations have the same status as a marketing cooperative all of whose members are producers. The fact that the members of a marketing agency in common are marketing cooperatives rather than individual producers does not change their status under the antitrust laws.

Mergers and Acquisitions

Mergers between marketing cooperatives should be regarded as entirely within the scope of the Section 1 exemption. Acquisitions of noncooperative firms, which are not within the Section 1 exemption, are to be judged by their potential effect upon competition. Where they do not tend to create a monopoly or injure competition, they are legal, as for other firms. Vertical integration through acquisition of a noncooperative is permissible if it does not foreclose the market to others. For example, if a milk cooperative were to purchase the only processor in the market which did not buy its milk from the cooperative, such an acquisition would eliminate the only outlet available to the noncooperative producers in the market.

Vertical Integration

Vertical integration through internal growth is legal both for cooperative and noncooperative firms if it does not result in monopoly. Vertical integration through acquisition is subject to the criteria for mergers and acquisitions.

Product Differentiation

Product differentiation activities, including branding, advertising, and promotion, generally do not constitute monopolization under the antitrust laws and would not be so regarded when engaged in by a cooperative. The courts have generally regarded such a development as the "superior product" referred to by the Supreme Court in the Grinnell case (87) and elsewhere. Thus, a cooperative which received higher prices for its products than did its competitors because it had developed a stronger brand with greater consumer acceptance would not be considered to have unduly enhanced prices.

Membership Contracts and Marketing Agreements

In an increasingly industrialized agricultural sector, marketing agreements between a cooperative and its members are coming into greater use. The marketing agreement obligates each member to sell the production from a specified acreage or farm through the cooperative and nowhere else. It obligates the cooperative to accept delivery. The cooperative which wishes to move beyond a simple buy-sell operation--where it takes whatever product is offered to it and finds a market for it--must utilize marketing agreements with its members to provide assurances of supply so that it can plan and carry out a marketing program of its own. With the assurance of supply provided by marketing agreements, the cooperative is in a position to make commitments to its customers. Such a marketing program, based on commitments by the membership to deliver to the cooperative and by the cooperative to deliver to its customers, is the basis for making financial commitments to build a processing plant, develop branded products, or develop a distribution system (4).

Marketing agreements are an essential element to enable a marketing cooperative to operate like a business corporation, as the framers of the Act and the courts contemplated. They permit a cooperative to acquire some degree of market power, as contemplated by the Act.

The antitrust agencies, however, are devoted to voluntary membership (10, p. 72; 12). They speak of "members entering and leaving at will." If their preference for such completely voluntary membership were to acquire the force of law, marketing agreements would lose their effectiveness and planning by a committed cooperative would become virtually impossible. The cooperative would have no assurance of volume and could not make sales commitments or merchandising plans based on a volume which could be reasonably anticipated. The result would almost certainly be to severely curtail market power.

Membership contracts and marketing agreements between a cooperative and its farmer members should be regarded as a necessary part of the operations of marketing cooperatives and legal in most circumstances. Here, as with other activities, a showing of predatory intent or predatory activites could change the interpretation.

Full Supply Contracts

Full supply contracts, under which the seller agrees to supply all of the needs of the buyer and the buyer agrees to buy only from that seller, are legal unless intent to foreclose the market to others can be shown.

Limiting Production

The manufacturer of industrial products has virtually complete legal control of his output and of the productive resources used to create output. Manufacturers who consider it to their economic advantage have both the power and the right to restrict production. These rights have never seriously been questioned. In an atomistic market for an industrial product, the power of the individual firm to restrict production has an indistinguishable effect on total production and therefore on price. In a monopolistic market, price can be determined by the quantity produced by the monopolist. In oligopolistic markets, the results are not determinate but some effect on price is often the result of limiting production.

In agriculture, on the other hand, the right and power of individual producers to limit their own production has virtually no effect in atomistic markets. For more than 100 years, the Government has recognized this inability of individual producers to affect price and has instituted programs to assist producers in curbing overproduction, shifting production to more profitable products, and improving the timing of marketing in order to affect price. Cooperatives are specifically authorized to undertake such activities by the Cooperative Marketing Act of 1926.

The Agricultural Outlook and Marketing Guides programs of the USDA are intended to have similar effects. However, the inadequacy of such efforts to encourage producers to voluntarily adjust production has been recognized and compulsory programs have been instituted to do what the voluntary programs could not achieve. These include acreage controls, marketing quotas, and other activities under the price support programs, as well as marketing orders.

Among the types of cooperatives discussed earlier, only committed bargaining or committed marketing cooperatives are at all likely to have any reason to restrict production, or membership, or both. The other "pure" types discussed operate on the basis of getting the best price possible for whatever quantity their members make available.

A committed marketing cooperative would have a strong incentive to limit the volume which it would handle for its members in a number of situations. The methods used might involve restricting membership, restricting the quantities marketed for members through marketing agreements, or actually restricting the output of its producer members. Such situations are primarily those where the cooperative's market is restricted or its capacity limited.

One such case would involve a cooperative which had developed a branded consumer product. Since the demand for any such product is not unlimited, the cooperative would either have to limit the volume of raw material received from its members or develop secondary outlets for the surplus. A comparable situation would exist if a cooperative had its own retail outlets (e.g., a chain of dairy stores). Such an organization might rationally decide to limit the amount of its members' milk handled to the volume which could be sold through its own outlets.

Other cooperatives find the size of their markets restricted by the volumes which their buyers will accept. One such case would arise if the cooperative had only one buyer, a processor who had contracted for a limited amount of product. The cooperative would then be compelled to set limits on the amount of product which each of its members could deliver. A similar situation would arise if the cooperative had a number of buyers, each of whom would accept only a specified amount.

In all of these cases and in others, there are sound business reasons for restricting the volume accepted from members by whatever means. The analogy of the cooperative with a business corporation used both by Congress and the Supreme Court (see 63) would seem to extend to limiting production of cooperative members through any of these means (40, p. 157). An appropriate policy would be to consider such arrangements as normal business practice and within the scope of the Section 1 exemption. The case of a cooperative monopolist must be considered separately.

Cooperative Monopoly

As we have seen, the existence of a cooperative monopoly is not illegal under the antitrust laws. However, if such a cooperative uses its market power to unduly enhance prices, its activities may constitute monopolization, on the grounds that the legality of a firm's activities is conditioned by the degree of market power which it possesses.

Market power is the ability to influence price, output, or product quality. The degree of market power which violates the antitrust laws is referred to as monopoly power. Thus, monopoly power can be understood as undue market power.

In antitrust law, the structure and related market power are usually considered only on the sellers' side of the market. Possible countervailing power on the buying side is generally ignored. This has made it possible to almost, but not quite, equate market share and market power in Sherman and Clayton Act cases. The Supreme Court said "(t)he existence of such power ordinarily may be inferred from the predominant share of the market" (88, p. 571).

The Ninth Circuit interpreted this as establishing "that market share, while being perhaps the most important factor, does not alone determine the presence or absence of monopoly power (69, p. 1,204).

In a Capper-Volstead case, consideration of market share alone will not suffice in evaluating relative market power, since the market power of buyers and sellers rest on different bases. (See also 50.) The market share of the cooperative seller of agricultural products has a quite different base than is found in the markets for industrial products. Manufacturers of steel or automobiles have virtually complete, legal control over output and the productive resources used to create that output. Manufacturers who consider it to their economic advantage have both the power and the right to restrict production. In the imperfectly competitive industrial markets of today and those for which the Sherman Act was designed in 1890, barriers to entry on the part of potential competitors make the power to restrict production a meaningful index of market power.

Most agricultural marketing cooperatives lack such power. Production decisions for a given crop or product are in the hands of farmers, some--perhaps most--of whom are members of the cooperative. Many cooperatives have marketing agreements with their members which require that the cooperative market all of a member's production but which provide no means of control by the cooperative over the volume of that production, as discussed previously.

The firm buying from that cooperative, on the other hand, is under no such obligation to accept the supplies. The buying firm may specify the quantity which it will buy and either refuse any additional quantity or accept it only at reduced prices. Thus, the market power of a marketing cooperative with a market share of, say, 75 percent cannot be equated to the market power of a buyer, say a processor, who takes 75 percent of the product.

The Supreme Court has recognized this difference:

> Pressure for this State and Federal antitrust legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups. These large sections of the population--those who labored with their hands and those who worked the soil--were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen . . .
>
> Since Connolly's case was decided, nearly 40 years ago, an impressive legislative movement bears witness to general acceptance of the view that differences between agriculture and industry call for differentiation in the formulation of public policy . . .
>
> At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commmerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. (75, pp. 145-7)

Appraising Possible Undue Price Enhancement

As we have noted, Section 2 instructs the Secretary of Agriculture to take action against a cooperative which monopolizes or restrains trade to such an extent that the price is unduly enhanced, but it does not define undue price enhancement.

Nearly every commentator makes much of the fact that no one has ever defined undue price enhancement. Congress didn't. The Secretary of Agriculture has not. The Courts have not. The only solution which the National Commission for the Review of Antitrust Laws and Procedures could think of was to go back to Congress for a definition (29). Such an attitude is understandable on the part of economists who customarily define first and analyze later. But it seems out of character for lawyers to take such a position, since the definition of most legal terms can only be deduced from a careful analysis of all of the court decisions on the subject. And what results from such an analysis is not a definition but a statement that, if the courts follow previous decisions, certain activities are within the prohibited area and others are not. But nothing is unequivocally in or out--the circumstances of the individual case and the approach of the individual judge always play a major role in the determination. Restraint of trade is not clearly defined. Monopolization is not defined. Because the Supreme Court has dealt with these offenses on a number of occasions, some of the outer bounds are known, but vast areas remain uncertain.

The Act does provide some guidance from the fact that, for a violation of Section 2 to occur, acts of monopolization or restraint of trade on the part of a cooperative must exist and be the cause of undue price enhancement. Thus, the first element of the definition is that, for undue price enhancement to be found, the price charged by the cooperative must exceed that which would exist in a market which included a cooperative of the same size and type which did not engage in acts of monopolization or restraint of trade.

A reasonable construction of the legislative intent of the Capper-Volstead Act, in the light of the language of the Act and its legislative history, would be that Congress intended that the existence and operations of cooperative marketing associations could legally raise the prices received by the cooperatives and the returns to their farmer members above the levels that would have existed without such cooperatives, but that there is, in fact, a level above which prices become unduly enhanced. The highest price which might possibly be obtained is that of a monopoly seller facing atomistic buyers. This is a monopoly price and almost certainly it would constitute undue price enhancement under Section 2 of the Capper-Volstead Act. This narrows the range of acceptable price enhancement to something more than the price which would exist without a cooperative and something less than that which could be obtained by a cooperative with 100 percent of the market (an economic monopolist) facing atomistic buyers.

The decision that the acts of a given cooperative do or do not constitute undue price enhancement must be reached on a case-by-case basis. Undue price enhancement is, by definition, to be decided by application of the "rule of reason." The USDA and ultimately, the Courts, must decide whether prices have been unduly (unreasonably) enhanced by economic analysis of the facts in the individual case. This starts with a definition of the economic market in which the cooperative operates. It includes analysis of the structure and behavior of the firms on the buying and selling sides in that market. The market power of the cooperative and of competing sellers, as well as the market power of buyers in the market, must be appraised. Since the market power of buyers and that of sellers in agricultural markets rest on different bases, this involves much more than a comparison of market shares. It involves a complex analysis of the total market and a judgment which recognizes the public interest. In general, one would anticipate that such an analysis would not conclude that undue price enhancement would be found in a case where the cooperative had no more market power than the congery of buyers which it faced in the market, but the situation would be sufficiently different in each case that one could not generalize that it might never be found.

CONCLUDING REMARKS

This study of the law and economics affecting agricultural marketing cooperatives should help to clarify the meaning of the Capper-Volstead Act in relation to the other antitrust laws and should facilitate development of USDA policy for the enforcement of Section 2 of the Capper-Volstead Act. As in all matters of law, final decisions will be made in the courts. But the initial decisions must be made in USDA and this examination of the issues should prove helpful in formulating policy.

As cooperatives grow in size and operational sophistication in order to compete in the modern American economy, they become more like noncooperative firms in many respects. This brings forward the questions of whether there should be a limited cooperative exemption and what the limits should be. Continuing examination of these issues will be needed as policy is formulated and modified over the years.

Publications

(1) American Institute of Cooperation. AMERICAN COOPERATION, annual, 1925-78.

(2) Benedict, Murray R. FARM POLICIES OF THE UNITED STATES, 1790-1950, Twentieth Century Fund, 1953, 548 pp.

(3) Berde, Sydney. "Congress, Cooperatives, and the Antitrust Laws," in (1), 1978, pp. 380-396.

(4) Black, W.E. "Marketing Agreements, in (26) pp. 227-235.

(5) Bork, Robert H. THE ANTITRUST PARADOX, A POLICY AT WAR WITH ITSELF, Basic Books, Inc., 1978, 462 pp.

(6) __________. "Legislative Intent and the Policy of the Sherman Act," JOURNAL OF LAW AND ECONOMICS, 9:7, 1966.

(7) Briloff, Abraham J. "Financial Motives for Conglomerate Growth," ECONOMICS OF CONGLOMERATE GROWTH, L. Garoyan, ed., Oreg. State Univ., 1969, pp. 81-87.

(8) Capper-Volstead Committee. THE QUESTION OF UNDUE PRICE ENHANCEMENT BY MILK COOPERATIVES, U.S. Dept. Agr., Dec. 1976.

(9) Clark, John M. COMPETITION AS A DYNAMIC PROCESS, Brookings Inst., 1961, 501 pp.

(10) Clearwaters, Keith I. "Antitrust Implications of Agricultural Bargaining," in (39), 1974, pp. 69-75.

(11) Connor, John M. COMPETITION AND THE ROLE OF THE LARGEST FIRMS IN THE U.S. FOOD AND TOBACCO INDUSTRIES. NC-117, WP-29. Feb. 1979, 166 pp.

(12) Dougherty, Alfred F., Jr. "Viewpoint: Federal Trade Commission," in (39), 1976, pp. 36-44.

(13) Dresbach, Howard. "Agricultural Cooperatives and the Antitrust Laws," in (1), 1962, pp. 333-346.

(14) Drucker, Peter F. "Pension Fund Socialism," THE PUBLIC INTEREST, Vol. 42, Winter 1976, pp. 3-46.

(15) __________. "Science and Industry, Challenges of Antagonistic Interdependence," SCIENCE, Vol. 204, 25 May 1979, pp. 806-810.

(16) Handler, Milton. A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS. TNEC Monograph No. 38, 1941.

(17) Harrison, Jeffry L. "The Lost Profits Measure of Damages in Price Enhancement Cases," MINNESOTA LAW REVIEW, 64: 751-788, 1980.

(18) Hoffman, A.C. "The Economic Rationale for Conglomerate Growth from a Management Perspective," ECONOMICS OF CONGLOMERATE GROWTH, L. Garoyan, ed., Oreg. State Univ., 1969, pp. 57-62.

(19) Hulbert, Lyman S. LEGAL PHASES OF FARMER COOPERATIVES, PART III: ANTITRUST LAWS, Inf. 100, Farmer Coop. Serv., U.S. Dept. Agr., May 1976, pp. 265-321.

(20) Knapp, Joseph G. CAPPER-VOLSTEAD IMPACT ON COOPERATIVE STRUCTURE, Inf.-97, Farmer Coop. Serv., U.S. Dept. Agr., Feb. 1975, 41 pp.

(21) Knutson, Ronald D. "The Impact of Cooperatives on Market Performance, Subsector Coordination and the Organization of Agriculture," in (26), pp. 301-313.

(22) Lane, Patrick D. "The Conduct Standard for Legally Acquired Monopolies under Section 2 of the Sherman Act," UNIVERSITY OF CINCINNATI LAW REVIEW, 49: 206-227, 1980.

(23) Lipson, Frank, and Clint Batterton. STAFF REPORT ON AGRICULTURAL COOPERATIVES, Bur. of Competition, U.S. Fed. Trade Comm., Sept. 1975.

(24) McIntyre, Everette. "Agricultural Cooperatives and the Antitrust Laws," in (1), 1965, pp. 179-191.

(25) __________. "Cooperative Bargaining Responsibilities Under Antitrust and the Federal Trade Commission Act," in (39), 1970, pp. 25-31.

(26) Marion, Bruce W., ed. AGRICULTURAL COOPERATIVES AND THE PUBLIC INTEREST: PROCEEDINGS OF A NORTH CENTRAL REGIONAL RESEARCH COMMITTEE 117 SPONSORED WORKSHOP. St. Louis, Mo., June 6-8, 1977, Studies of the Organization and Control of the U.S. Food System, N.C. Project 117, Monograph 4, N. C. Reg. Res. Pub. 256, Sept. 1978, 323 pp.

(27) Miller, Seward A. "The Capper-Volstead Act--Its Background, History and Interpretation," in (1), 1950, pp. 396-412.

(28) Mueller, Willard F. "The Capper-Volstead Exemption," in REPORT OF ECONOMIC ADVISORY PANEL TO THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, Nov. 9, 1978.

(29) National Commission for the Review of Antitrust Laws and Procedures. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION, Jan. 16, 1979.

(30) Nourse, Edwin G. THE LEGAL STATUS OF AGRICULTURAL COOPERATION, New York: The MacMillan Company, 1927.

(31) Papandreou, Andreas G., and John T. Wheeler. COMPETITION AND ITS REGULATION, Prentice-Hall, Inc., 1954, 504 pp.

(32) Reynolds, Bruce J. "Many Early Co-ops Had Clout," FARMER COOPERATIVES, Econ., Stat., Coop. Serv., U.S. Dept. Agr., Jan.-Feb. 1980, pp. 21-23.

(33) __________. LARGE-SCALE COOPERATIVE MARKETING DURING THE EARLY TWENTIES, Econ., Stat., Coop. Service, U.S. Dept. Agr., Working Paper, Dec. 1979, 11 pp.

(34) Shackelford, Frank. "Acquisitions and Mergers by Agricultural Cooperatives--The Present State of the Law," in (1), 1968, pp. 136-146.

(35) Stark, Donald D. "Capper-Volstead Revisited," in (1), 1960, pp. 453-473.

(36) Stocking, George W., and Myron W. Watkins. MONOPOLY AND FREE ENTERPRISE, The Twentieth Century Fund, 1951, 596 pp.

(37) Turner, Donald F. "Antitrust Issues in Cooperative Bargaining," in (39), 1966, pp. 71-78.

(38) U.S. Department of Justice. MILK MARKETING, Report of the U.S. Dept. of Justice to the Task Group on Antitrust Immunities, Jan. 1977.

(39) U.S. Department of Agriculture, Farmer Cooperative Service. PROCEEDINGS OF THE NATIONAL CONFERENCE ON FRUIT AND VEGETABLE BARGAINING COOPERATIVES, annual, 1957-79.

(40) Williams, Melville C. "Capper-Volstead--What it Means Today," in (1), 1971, pp. 154-159.

Congressional Record and Reports

(41) U.S. Congress, 38 Stat. at Large, Part 1, 53; 43 Stat. 1027; and 44 Stat. 343, 1194.

(42) __________, CONGRESSIONAL RECORD. 51st Congress, 1st Session (1890).

(43) __________, CONGRESSIONAL RECORD. 63rd Congress, 2nd Session, p. 12,908 (1914). This was Senator Pomerene's explanation during discussion of the Clayton Act in 1914.

(44) __________, CONGRESSIONAL RECORD. 66th Congress, 1st Session (1920).

(45) __________, CONGRESSIONAL RECORD. 67th Congress, 1st Session (1922).

(46) __________, House of Representatives Report No. 24, 67th Congress, 1st Session 2 (1922).

(47) __________, House of Representatives Report No. 71, 67th Congress 1st Session 2 (1922)

(48) __________, Senate Report No. 236, 67th Congress, 1st Session. (1922).

(49) __________, Senate Committee on the Judiciary, Hearings on authorizing associations of producers of agricultural products, June 2-20, 1921.

Court and FTC Cases

(50) American Tobacco Co. v. U.S., 328 U.S. 781, 814 (1946).

(51) Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476 (DC Mo. 1965).

(52) Brief by Dept. of Justice, Ninth Circuit, Sunkist case, No. 79-3091, 1979.

(53) Brief by Dept. of Justice in U.S. v. Associated Milk Producers, Inc., 394 F. Supp. 29, Appendix A, p 5. (DC W.D. Mo. 1975).

(54) Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242 (DC Mass. 1954).

(55) Case-Swayne Co., Inc., v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

(56) Fairdale Farms Inc., v. Yankee Milk, Inc., and Regional Cooperative Marketing Agency, Inc.; Yankee Milk, Inc. v. Fairdale Farms, Inc., CCH REPORTER, 77,110 (1979), and 77,701 (1981).

(57) Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

(58) Ford v. Chicago Milk Shippers Assoc., 155 Ill. 166, 39 N.E. 651 (1895).

(59) Harrison v. Northern Trust Co., 317 U.S. 476, 479, 87 L. Ed. 407 (1942).

(60) Hinton v. Columbia River Packers, 315 U.S. 143 (1942).

(61) Interstate Circuit, Inc., v. U.S., 306 U.S. 208 (1939).

(62) Kinnett Dairies, Inc. v. Dairymen, Inc., CCH REPORTER, 75,564, 1981.

(63) Maryland and Virginia Milk Producers Ass'n., Inc., v. U.S., 362 U.S. 458 (1960).

(64) Maryland and Virginia Milk Producers Ass'n. v. U.S., 167 F. Supp. 45 (DC D.C. 1958), reversed in part on other grounds, 362 U.S. 458 (1960).

(65) Maryland and Virginia Milk Producers Ass'n, Inc., v. U.S., 193 F. 2d 907 (D.C. Cir. 1951).

(66) New York Trust Co. v. Eisner, 256 U.S. 345, 349, 65 L. Ed. 963 (1921).

(67) Northern California Supermarkets, Inc., v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984 (N.D. Cal. 1976).

(68) Orbo Theater Corp. v. Loew's, Inc., 156 F. Supp. 770, (DC D.C. 1957)

(69) Pacific Coast Agr. Export Ass'n. v. Sunkist Growers, Inc., 526 F. 2d 1196 (9th Cir. 1975).

(70) Reeves v. Decorah Farmers Cooperative Society, 160 Iowa 1914, 140 N.W. 844 (1913).

(71) Shoenberg Farms, Inc., v. Denver Milk Producers, Inc., 231 F. Supp. 266 (D. Colo. 1964).

(72) Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (U.S. Sup. Ct. 1911).

(73) Sunkist Growers, Inc., v. Winckler and Smith Citrus Prod. Co., 370 U.S. 19 (1962).

(74) Theater Enterprise, Inc., v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

(75) Tigner v. Texas, 310 U.S. 141 (1940).

(76) Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc., 497 F. 2d 203 (Ninth Circuit, 1974).

(77) Union Sewer Pipe Co. v. Connolly, 184 U.S. 540, 22 Sup. Ct. 431 (1902).

(78) United Egg Producers v. Bauer Int. Corp., 312 F. Supp. 319 (S.D. N.Y. 1970).

(79) U.S. v. Aluminum Company of America, 148 F. 2d 416 (Second Cir. 1945).

(80) U.S. v. American Tobacco Co,. 221 U.S. 106 (1911).

(81) U.S. v. American Trucking Ass'n., 310 U.S. 534, 543, 84 L. Ed. 1345 (1940).

(82) U.S. v. Borden Co., 308 U.S. 188 (1939).

(83) U.S. v. Congress of Industrial Organizations, 335 U.S. 106, 112, 92 L. Ed. 1894 (1948).

(84) U.S. v. Dairy Cooperative Ass'n., 49 F. Supp. 475 (DC Oreg. 1943).

(85) U.S. v. E.I. duPont de Nemours and Co., 118 F. Supp. 41 (DC Del. 1953); affirmed on other grounds (U.S. Supreme Court 1956, 351 U.S. 377).

(86) U.S. v. E.I. duPont de Nemours & Co., 351 U.S. 377, 393 (1956).

(87) U.S. v. Grinnell Corp., 384 U.S. 563 (1966).

(88) U.S. v. King, 229 Fed. 275, 250 Fed. 908. (DC Mass., 1916).

(89) U.S. v. Maryland Coop. Milk Producers, Inc., and Maryland and Virginia Milk Prod. Ass'n., Inc., 145 F. Supp. 151 (DC D.C. 1956).

(90) U.S. v. Milk Drivers and Dairy Employees Union, 153 F. Supp. 803.

(91) U.S. v. National Broiler Marketing Ass'n., 436 U.S. 816 (1978).

(92) U.S. v. Rock Royal Coop. Inc., 307 U.S. 533, 560 (1939).

(93) U.S. v. United States Steel Corp., et al., 251 U.S. 417, 451 (1920).

(94) Wm. Filene's Sons Co. v. Fashion Originators Guild of America, Inc., 90 F. 2d 556 (CCA-1, 1937).

(95) Winckler and Smith Citrus Products Co. v. Sunkist Growers, Inc., 284 Fed. 2d 1, 23 (1960).

(96) In re Washington Crab Assoc. 66 FTC 45 (1964).

(97) FTC Opinion and Order, Docket No. 8970, July 25, 1977, p. 12.

(98) FTC Advisory Opinion to Central Milk Prod. Coop., File No. 693 7053, Nov. 21, 1968 (unpublished).

(99) FTC Opinion, Central California Lettuce Producers Cooperative, (1977), TRADE REGULATION REPORTS (CCH) #21,337 at 21,236.

APPENDIX A: THE CAPPER-VOLSTEAD ACT

Public Law No. 146--67th Congress: An Act to Authorize Associations of Producers of Agricultural Products

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations and their members may make the necessary contracts and agreements to effect such purposes; Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

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

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

And in any case to the following:

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

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

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy.

Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

APPENDIX B: UNDUE PRICE ENHANCEMENT CASES

Seven cases of possible undue price enhancement were subject to inquiry by the Department of Agriculture between 1969 and 1979. There is no knowledge of earlier cases, although it is possible that there were others, especially in the early years.

Six of the seven cases involved milk and all of these related to over-order payments. The seventh case concerned potatoes for processing in Idaho.

Three of the inquiries--in 1969, 1972, and 1973--resulted from complaints by milk buyers. In one case, the buyer was joined by a minority cooperative. The fourth was a general inquiry stemming from a communication from the Judiciary Committee of the House of Representatives in 1973. A 1974 inquiry was originated within the Department. The final case stemmed from a petition filed by the National Consumers' Congress suggesting that the Secretary should have reason to believe that the price of milk was unduly enhanced in any Federal order market in which over-order payments were 50 cents or more per hundredweight in any month during 1975. The Capper-Volstead Committee, which was then charged with enforcement of Section 2, reported its conclusions in December 1976 (8). This is the only case in which a written report was made public, although testimony was presented before the House Judiciary Committee in 1973.

In the potato case, the major Idaho potato processor complained that the cooperative bargaining association had unduly enhanced prices in 1974 by refusing to sign a contract at a lower price. The increase in price from 1973 to 1974 was cited as evidence of undue price enhancement. A review of supply and demand conditions led to the conclusion that prices had not been unduly enhanced.

In each case, the inquiry took the form of a careful review of supply and demand conditions in the market affected, including comparisons with other markets. The task was to search for prices which were out of line with supply and demand conditions, which would have been evidence of possible undue price enhancement.

Why were there no cases before 1969? One possible explanation is that cooperatives did not have enough market power to significantly affect prices until the sixties, so no one complained. In addition, most of the cases involved milk and were based on the size of over-order payments. Cooperative over-order payments came into existence in the mid-fifties. In the first half of the sixties, they were found in about one-third of Federal order markets, rising to 65 percent in 1970. This increase in over-order payments coincided with the growth of federations and larger regional cooperatives in the sixties and early seventies. It also coincided with a drastic change in the functions of cooperatives and the services performed by them.

Over-order payments provide a handy indicator which is sometimes used as a measure of undue price enhancement, as in the National Consumers' Congress petition. Thus, the emergence of over-order payments was a precursor of complaints of undue price enhancement for milk.

☆U.S. GOVERNMENT PRINTING OFFICE: 1982-360-932:ERS-1044

United States
Department of Agriculture

Washington, D.C.
20250

OFFICIAL BUSINESS
Penalty for Private Use, $300

POSTAGE AND FEES PAID
U. S. DEPARTMENT OF AGRICULTURE
AGR - 101

U.S.MAIL

THIRD CLASS BULK RATE

Economic Research Service

The Economic Research Service carries out research on the production and marketing of major agricultural commodities; foreign agriculture and trade; economic use, conservation, and development of natural resources; trends in rural population, employment, and housing; rural economic adjustment problems; and performance of the U.S. agricultural industry. ERS provides objective and timely economic information to farmers, farm organization members, farm suppliers, marketers, processors, consumers, and others who make production, marketing, and purchasing decisions, and to legislators and other public officials at the Federal, State, and local government levels