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Analyzing Conspiracy Claims Under Capper-Volstead

Law360, New York (January 24, 2012, 1:46 PM ET) -- On Dec. 2, 2011, a district court denied a motion to dismiss antitrust conspiracy claims against potato grower cooperatives in several states. In re Fresh and Process Potatoes Antitrust Litigation, United States District Court for the District of Idaho, Case No. 4:10-MD-2186-BLW.

The plaintiffs alleged that the defendant cooperatives agreed among themselves, through their cooperative structure, to restrict the output of their members by limiting potato planting acreages, paying farmers to destroy existing stocks and refraining from bringing additional potatoes to market.

The alleged purpose of the output-restricting conspiracy was to augment demand among direct purchasers of potatoes, thus driving up prices. The defendant cooperatives moved to dismiss on the ground that the allegations of antitrust conspiracy were immune, pursuant to the federal Capper-Volstead Act of 1922, 7 U.S.C. § 291-292.

In the years following enactment of the Capper-Volstead Act, the United States Supreme Court has held that the act only provides limited immunity within its statutory terms. Thus, Capper-Volstead protection extends only to associations of "persons engaged in the production of agricultural products."

If a cooperative agreement includes persons other than "producers" — such as "processors" — immunity is forfeited. However, the inquiry may become fact-specific as to the status of producer members who are vertically integrated into various levels within the distributive stream. When does a "producer" mutate into a nonexempt "processor"?

The law also has been relatively straightforward that agricultural immunity is forfeited where the cooperative, or its members, engages in "predatory" acts directed at third-parties. "Predatory" acts include, without limitation:

1. The securing of shipping space in order to deny it to a competitor;
2. Boycotting, picketing or otherwise intimidating the customers of rival processors;
3. Forcibly excluding nonmembers from packing facilities;
4. Intimidating or boycotting dealers who paid less than prices charged by the cooperative; and
5. Inducing suppliers and carriers to refuse to deal with rivals.

See, e.g., Areeda and Hovenkamp, Antitrust § 249 (2011).

An issue of significance in In re Fresh and Process Potatoes, however, is whether Capper-Volstead immunity extends beyond the setting of sales prices through "collectively processing, preparing for market, handling, and marketing" to efforts to augment the sales price of the commodity through agreements to restrict output.

Surprisingly, in the 90 years of the act's existence, this issue has remained unresolved.

The issue is clearly presented in In re Fresh and Process Potatoes, and is also in the forefront of additional pending class actions, including, without limitation, Edwards v. National Milk Producers Federation, et al., U.S. District Court, N.D. Cal., Case No. 4:2011cv-04766 (Sept. 26, 2011), and In re Processed Egg Products Antitrust Litigation, United States District Court, E.D. Pa., Case No. MDL No. 2002 (Nov. 26, 2011).

As this piece was being written, a "new arrival" is Kraft Foods Global Inc., et. al. v. United Egg Producers Inc., U.S. District Court, N.D. Ill. (Dec. 12, 2011). Presumably, it will be MDL'd to the E.D. Pa.

In Edwards, plaintiffs allege that the National Milk Producers Federation and other dairy companies conspired to limit the production of milk by paying farmers to reduce the size of their milk herds, in order to increase the prices of milk to consumers. The practice was commonly referred to as "herd retirement" within the industry. The complaint alleges that the conspiracy involved 70 percent of the nation's milk supply.

In In re Processed Egg Products Antitrust Litigation, plaintiffs allege that United Egg Producers and other cooperatives conspired to induce their members to restrict egg output by restricting members' flock sizes, through the pretext of reducing cage space densities for hens for animal welfare reasons.

In addition, it is alleged that members were encouraged to export eggs at a loss, thus reducing the domestic egg supply available to consumers. In each of these actions, motions to dismiss have been denied, pending further discovery.

While the issue of the immunity of an agreement reducing members' output has been alluded to by commentators, it has remained fallow, and has not been ripe for adjudication until recently. Why is this so? Hypothetical answers at least present themselves. In re Fresh and Process Potatoes has now joined the flock.

Beginning in 2010, then assistant attorney general in charge of the Antitrust Division, Christine Varney, announced that a new antitrust task force of investigators from the U.S. Department of Justice had joined with investigators from the U.S. Department of Agriculture (USDA), to spearhead new enforcement oversight into the agricultural sector. See Christine A. Varney, The Capper-Volstead Act, Agricultural, Cooperatives and Antitrust Immunity, The Antitrust Source (December 2010).

This oversight has been augmented by state attorneys general and a series of private treble damage class actions in the agricultural sector. Varney also announced that, in addition to the ongoing task force investigation with the USDA, proposed extensive new regulations for the meat industry were also forthcoming.

Enforcement officials' statements announcing increased scrutiny into limiting Capper-Volstead immunity are not new. In fact, they have been periodically reappearing since the 1938 Technical National Economic Committee, the 1955 Attorney General's National Committee To Study The Antitrust Laws, the 1979 National Commission For The Review Of Antitrust Law And Procedures, and the 2007 Antitrust Modernization Commission Report and Recommendations.

Nevertheless, the legality of output restriction agreements among agricultural cooperatives and their members seems to be an issue whose time has finally come.

In In re Fresh and Process Potatoes, the court concluded, in denying the cooperatives' motion to dismiss, that it could not determine whether the Capper-Volstead exemption applied without a fact-intensive inquiry into two issues.

The first was whether vertically integrated members of the cooperatives included "nonproducers," such that Capper-Volstead immunity would be forfeited.

Second, was whether the Capper-Volstead Act included, within the concept of "marketing," agreements to collectively implement production controls, in order to raise prices. See Slip Opinion at 8 n.5.

In what it termed an "advisory opinion," it is now the court's tentative conclusion that Capper-Volstead immunity does not protect agreements to limit output. The court was of the tentative view that the language of Section 1 of the Capper-Volstead Act only applied to

> "... acts done to an agricultural product after it has been planted and harvested. Thus, under the plain language of the statute, coordinating and reducing acreage for planting is not allowed." Id. at 14.

The court noted by footnote that the federal enforcement agencies have from time to time come to the same conclusion, namely that production limitations are not permitted.

The defendants argue that because Capper-Volstead cooperatives are allowed to fix prices, they must also be allowed to restrict production.

Economics and logic suggest that output and price are at least complementary functions, if not simply two separate vantage points for viewing a single integrated economic concept. This is suggested by economic literature of supply-demand equilibria from Smith and Ricardo, through Marshall, Keynes and Samuelson.

In fact, it is at least inferred by Messrs. Areeda and Hovenkamp that a cartel's ability to maintain a uniform pricing regime requires that it also be able to reduce its market output. See Antitrust Section 249d. See also, Holly Sugar Corp. v. Goshen County Coop. Beet Growers Association, 725 F.2d 564 (10th Cir. 1984).

Holly Sugar holds that it is permissible under Capper-Volstead for a cartel to require agreement from its producer members that they not make sales outside the cartel. In addition, marketing orders made pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 671, and various state legislation to the same purpose and effect, pursuant to a marketing agreement, may lawfully limit the amount of produce allowed to be marketed under the order.

Further, it is generally conceded by commentators that a Capper-Volstead cooperative association may limit the amount of produce that it will agree to purchase from its members.

Thus, there may be a good argument that the term "marketing" within the meaning of Section 1 of the Capper-Volstead Act implies that a cooperative's members can utilize an efficient means of price uniformity to enhance and augment the "price-taker" historic position in which they had been cast, and which was the impetus for the enactment of Section 6 of the Clayton Act, and Capper-Volstead itself.

The case law and commentary on Capper-Volstead supports the proposition that one of the purposes of its enactment was to allow farmers to raise the price of their output. Capper-Volstead was thus intended to facilitate the transfer of rents from consumers to producers.

As is generally understood in antitrust economics, even a modest reduction in the output of a homogeneous, inelastic product may significantly augment sales prices. Such is the case with many agricultural commodities.

Capper-Volstead was designed to allow the farmers and other producers of agricultural products to join together in cooperatives and raise the price of their products to consumers. By the same token, producers were not allowed to engage in predatory conduct to facilitate the joint raising of prices, or to combine with nonproducer elements to facilitate price increases.

One could argue that Congress must have intended to allow agricultural producer cooperatives' to meter their output by limiting their members' production. Otherwise, "cheating" on cooperatives' enhanced prices to consumers may defeat the ability of the producers to transfer consumer rents to themselves.

Yet, the In re Fresh and Process Potatoes court reasons to the contrary. It states that while an agricultural cooperative can fix the prices at which its goods are sold, it is the individual freedom of its members to augment production that prevents consumers from being overcharged. As stated by the court:

> "Individual freedom to produce more in times of high prices is a quintessential safeguard against Capper-Volstead abuse, which Congress recognized in enacting the statute." Id. at 17.

Perhaps a rejoinder would be that Congress intended that agricultural prices would rise as a result of agricultural cooperative price fixing, and it was Section 2 of the act that would prevent "abuse." Section 2 empowers the secretary of agriculture to administratively prevent cooperatives from using their market power to such an extent that the price of any agricultural product "is unduly enhanced". See, 7 U.S.C. § 292.

An argument could be made that this, and not the individual right to "cheat" on the cartel, is the quintessential safeguard against Capper-Volstead abuse.

But the court also relies upon dicta of the Federal Trade Commission in In re Matter of Central California Lettuce Producers Cooperatives, 90 F.T.C. 18, at 32 n. 20 (1977). There, the commission opined:

> "[T]here are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production."

At this point, the pending litigation, described above, presents more questions than answers. But perhaps a quote from Galatians 6:7 is appropriate for the season:

> "Be not deceived; God is not mocked: for whatever a man soweth, that shall he also reap."

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