NOTES

ANTITRUST ACTION AGAINST MILK MARKETING COOPERATIVES—SHAKING UP THE MILK INDUSTRY

I. INTRODUCTION

The Capper-Volstead Act[1] was passed by Congress in 1922 to give stock-based agricultural cooperatives an exemption from prosecution under the Sherman[2] and Clayton[3] Antitrust Acts.[4] Labeled agriculture's "Magna Carta,"[5] the passage of this bill was the culmination of years of legislative discussions concerning what position agricultural cooperatives should take in relation to the antitrust laws.[6] Since 1922, the courts have been struggling to define the boundaries Capper-Volstead established for the operation of agricultural cooperatives in a changing agricultural system.[7]

In recent years, the increasingly sophisticated structure of the milk industry,[8] in relation to both the size of marketing units[9] and increased federal regulation,[10] has resulted in studies by various government agencies

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1. 7 U.S.C. §§ 291-92 (1976).
2. 14 U.S.C. §§ 1-7 (1976).
3. 15 U.S.C. §§ 1-17 (1976).
4. *See* R. CALKINS, ANTITRUST GUIDELINES FOR THE BUSINESS EXECUTIVE, 241-44 (1981); N. HARL, AGRICULTURAL LAW § 137 (1982); Warlich & Brill, *Cooperatives Vis-A-Vis Corporations: Size, Antitrust and Immunity*, 23 S.D.L. REV. 561, 563-64 (1978); Note, *The Agricultural Cooperative Antitrust Exemptions—Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 67 CORNELL L. REV. 396, 396-97 (1982) [hereinafter cited as Note, *The Agricultural Cooperative Antitrust Exemptions*]; Note, *Antitrust Law: Agricorporate Membership in Cooperatives—Is the Capper-Volstead a Threat to Farmers?*, 17 WASHBURN L.J. 525, 526 (1978) [hereinafter cited as Note, *Agricorporate Membership in Cooperatives*]; Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 355 (1953) [hereinafter cited as Note, *Agricultural Cooperatives*].
5. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 400 (citing Allen Bradley Co. v. Local Union, 325 U.S. 797, 804 (1945)).
6. ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, E.R.S. NO. 673, THE STATUS OF MARKETING COOPERATIVES UNDER ANTITRUST LAWS 3-7 (1982) [hereinafter cited as MARKETING COOPERATIVES REPORT]. *See* Note, *Anti-trust Law—Fairdale Farms, Inc. v. Yankee Milk, Inc.: The Right of Agricultural Cooperatives to Possess Monopoly Power*, 7 J. CORP. L. 339, 348-56 (1981-82).
7. *See* HARL, *supra* note 4, at 137-87.
8. *See* A REPORT OF THE U.S. DEPT. OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES, MILK MARKETING (1977) [hereinafter cited as MILK MARKETING REPORT].
9. Note, *Agricorporate Membership In Cooperatives*, *supra* note 4, at 526.
10. Ring, *Federal Milk Regulation—A Time For Administrative Reform*, 31 AD. L. REV.

calling for changes in[11] or clarification of[12] this exemption. In addition, within the last five years a number of federal courts have been called upon to apply the Capper-Volstead exemption to the present milk industry.[13] These court decisions have resulted in a variety of standards being applied to define the boundaries of Capper-Volstead.[14] Since there are no recent Supreme Court decisions applying Capper-Volstead to the milk industry, how far the exemption will extend is presently illusory.[15] As a consequence, there is little predictability for parties involved in this type of litigation.[16]

This Note will contain a brief history of both the statutes[17] and early court decisions[18] to establish the historical position of the Capper-Volstead exemption.[19] It will also analyze recent court cases which have considered how Capper-Volstead applies to today's milk industry.[20] In addition, the milk production system of 1922[21] will be compared to the modern milk industry[22] in order to examine how industry changes have affected Capper-Volstead's application. In conclusion, this Note will review the various governmental studies calling for changes in Capper-Volstead[23] to determine why Supreme Court application of Capper-Volstead to the present milk industry activities is necessary and why Congressional redefinition of the exemption for milk cooperatives is justified.

II. Historical Perspective

Before 1870, farmers generally operated as individual production and

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345, 346 (1979).

11. Milk Marketing Report, *supra* note 8, at 575.

12. Comptroller General's Report to the Congress, Family Farmers Need Cooperatives—But Some Issues Need To Be Resolved, ii (1979) [hereinafter cited as Comptroller General's Report]; Marketing Cooperatives Report, *supra* note 6, at 39; Report of the Task Group On Antitrust Immunities, U.S. Dept. of Justice, 12 (1977) [hereinafter cited as Antitrust Immunities Report].

13. *See* Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1158 (8th Cir. 1982); Alexander v. National Farmers' Org., 687 F.2d 1173, 1182 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983); Dairymen, Inc. v. FTC, 684 F.2d 376, 377-78 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 2452 (1983); United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980).

14. *See supra* note 13. *See also* Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 405.

15. Milk Marketing Report, *supra* note 8, at 229.

16. Marketing Cooperative Report, *supra* note 6, at 18.

17. Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12-27 (1976); Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1976).

18. *See generally* Harl, *supra* note 4, at 137-87.

19. 7 U.S.C. §§ 291-92 (1976).

20. *See supra* note 13.

21. Milk Marketing Report, *supra* note 8, at 19 (citing Dep't of Agriculture Y.B., *The Dairy Industry* 281 (1922)).

22. *Id.* at 157-71.

23. *See supra* notes 11-12.

marketing units.[24] The National Grange movement, however, which developed as a consequence of the agricultural depression following the Civil War,[25] had resulted in scattered attempts at organizing farmers for marketing and purchasing.[26] The most notable of these efforts was among dairy farmers.[27] While the Grange movement soon lost its national significance, by 1890 the idea of farm cooperatives had become firmly established within the agricultural system.[28] These early efforts in cooperation gave farmers more power when buying from or selling in the market place.[29]

When the Sherman Antitrust Act[30] was passed in 1890, to restrain unfair practices employed by rapidly growing corporations,[31] there was concern expressed in Congress that the Act might have a negative effect on the farm cooperative movement.[32] During debate on the Sherman Act, Congress considered and rejected a partial exemption for farm cooperatives.[33] Senator Sherman had assured Congress that his bill would not interfere with agricultural cooperatives.[34] The Supreme Court, however, determined that the Sherman Act could be used to restrain farm cooperatives.[35]

Consequently, twenty five years later, when passage of the Clayton Antitrust Act[36] was being considered by Congress, the need for an agricultural cooperative exemption was again put forward.[37] As a result, section 16 of the Clayton Act[38] was passed which gave a limited immunity to non-stock agricultural organizations.[39] The Clayton Act[40] provided that labor, agricultural, and horticultural organizations could be formed,[41] but did not define what activities they could legally engage in without being subjected to antitrust

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24. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 398 (citing Mischler, *Agricultural Cooperative Law*, 30 ROCKY MTN. L. REV. 381, 381 (1958)).

25. Note, *Agricultural Cooperatives*, *supra* note 4, at 354.

26. *Id.*

27. *Id.*

28. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 398.

29. COMPTROLLER GENERAL'S REPORT, *supra* note 12, at 1.

30. 15 U.S.C. §§ 1-7 (1976). Section 1 of the Sherman Act prohibits "any contract, combination . . . or conspiracy in restraint of trade." *Id.* § 1. Section 2 prohibits monopolization or attempted monopolization. *Id.* § 2. *See also* Warlich & Brill, *supra* note 4, at 561-62.

31. Warlich & Brill, *supra* note 4, at 562.

32. *Id.*

33. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 398.

34. Warlich & Brill, *supra* note 4, at 562.

35. *See* Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4 at 399.

36. 15 U.S.C. § 16 (1976). Section 16 of the Clayton Act confined itself to allowing the formation of farm organizations that had no capital stock and were not conducted for profit. *Id.* It did not, however, suggest the activities in which the organizations were allowed to engage. *Id: See also* Warlich & Brill, *supra* note 4, at 563.

37. Warlich & Brill, *supra* note 4, at 562.

38. 15 U.S.C. § 16 (1976).

39. R. CALKINS, ANTITRUST GUIDELINES FOR THE BUSINESS EXECUTIVE, 241 (1981).

40. 15 U.S.C. §§ 12-27 (1976).

41. *Id.* § 17.

prosecution.[42] Thus, only non-stock cooperatives were allowed an exemption. In addition, various state legislatures had passed statutes protecting agricultural cooperatives.[43] These statutes, however, were struck down by the United States Supreme Court,[44] leaving agricultural cooperatives open to further judicial attacks.[45]

When the Clayton Act exemption proved insufficient,[46] Congress addressed the problem of providing an effective exemption for agricultural cooperatives, for the third time.[47] The result was the passage of the Capper-Volstead Act in 1922.[48] This legislation allowed "farmers, planters, ranchmen, dairy men, nut or fruit growers" to form corporate cooperatives with capital stock and to join "in collectively processing, preparing for market, handling, and marketing" their products.[49] The purpose of this Act was to place individual farmers, acting jointly through their cooperatives, on a par with businessmen, acting through their corporations.[50]

Capper-Volstead, however, did not provide total immunity for agricultural cooperatives from antitrust actions.[51] Section 2 of the Act authorized the Secretary of Agriculture to initiate action against any cooperative that monopolized or restrained trade "to such an extent that the price of any agricultural product is unduly enhanced."[52] While it was originally asserted that the Secretary of Agriculture had exclusive jurisdiction over antitrust actions against milk cooperatives, it was later determined that other parties could bring such actions.[53] Consequently, agricultural cooperatives may still be found guilty of violating antitrust legislation in actions brought by private parties or by other government departments. This seemingly simple, straight-forward legislation, in conjunction with the Clayton Act, is the basis of the exemption from antitrust prosecution granted to agricultural cooperatives today.[54]

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42. Warlich & Brill, *supra* note 4, at 563.

43. Note, *Agricultural Cooperatives*, *supra* note 4, at 432.

44. *See* Connolly v. Union Serv. Pipe Co., 184 U.S. 540, 560 (1902). The Court held that state antitrust exemption for agricultural organizations violated the fourteenth amendment equal protection clause by creating an unreasonable classification. *Id.*

45. Note, *Agricultural Cooperatives*, *supra* note 4, at 432.

46. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 400.

47. Warlich & Brill, *supra* note 4, at 563.

48. *Id.*

49. 7 U.S.C. § 291 (1976).

50. Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 548, 549 (1960).

51. *See generally* 54 AM. JUR. 2D *Monopolies* § 193 (1971).

52. 7 U.S.C. § 292 (1976).

53. United States v. Borden Co., 308 U.S. 188, 191 (1939). *See* Warlich & Brill, *supra* note 4, at 563.

54. Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4, at 400. *Contra* Lemon, *The Capper-Volstead Act—Will It Ever Grow Up?* 22 AD. L. REV. 443 (1969-70).

III. Judicial Interpretation

Since the passage of Capper-Volstead the courts have been called upon to apply the exemption and to define what agricultural cooperative activities are within the exemption.[55] A survey of the major cases in this area reveals certain basic standards the courts have established to define what agricultural cooperatives may or may not do and still retain their exemption.[56] These standards fall into fairly distinct categories with the courts considering allowable membership,[57] market share,[58] and marketing activities.[59] While these decisions range across the broad spectrum of the agricultural system, from fish to fowl, the principles they establish are applicable to all agricultural cooperatives, including milk.

A. *Membership*

The Supreme Court has determined that section 1 of Capper-Volstead, requiring that cooperative members be "producers and farmers," means that any cooperative with non-producer voting members will lose its exemption.[60] In *Case-Swayne Co. v. Sunkist Growers, Inc.*,[61] the Court examined the membership organization of the Sunkist system, an agricultural cooperative whose membership base consisted of 12,000 citrus growers.[62] The Court, upon finding that a small percentage of the cooperative's members were owners of packing houses rather than producers,[63] concluded that these non-producer members destroyed Sunkist's Capper-Volstead privilege.[64]

In *National Broiler Marketing Association v. United States*,[65] the Supreme Court was again called upon to define the term "farmer" under Capper-Volstead.[66] The broiler industry under examination in this case con-

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55. Harl, *supra* note 4, at 137-87.

56. *See* Warlich & Brill, *supra* note 4, at 583.

57. *See* National Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 822 (1978); Case-Swayne Co. v. Sunkist Growers, 389 U.S. 384, 387 (1967), *reh'g denied*, 390 U.S. 930 (1968); Sunkist Growers v. Winkler & Smith Co., 370 U.S. 19, 29, *reh'g denied*, 370 U.S. 965 (1962).

58. *See* Cape Cod Food Prods. v. National Cranberry Ass'n, 119 F. Supp. 900, 907 (D. Mass. 1954).

59. *See* Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 466-67 (1960); United States v. Borden Co., 308 U.S. 188, 203 (1939); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, 497 F.2d 203, 216-17 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); Gulf Coast Shrimper's & Oysterman's Ass'n v. United States, 236 F.2d 658, 665 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956).

60. National Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 822 (1978); Case-Swayne Co. v. Sunkist Growers, 389 U.S. 384, 387 (1967), *reh'g denied*, 390 U.S. 930 (1968).

61. 389 U.S. 384 (1967), *reh'g denied*, 390 U.S. 930 (1968).

62. *Id.* at 386.

63. *Id.* at 387.

64. *Id.* at 395-96.

65. 426 U.S. 816 (1978).

66. *Id.* at 817-18.

sisted of a fully integrated poultry operation whose members owned and controlled production from the egg to the full-grown, processed chicken.[67] The issue in this case was whether a producer who employed an independent contractor to take care of the chickens during the "grow out" phase of production qualified as a Capper-Volstead "farmer."[68] The Court found such a producer was not a "farmer" as required by Capper-Volstead and that cooperatives that included such persons as members were not qualified for a Capper-Volstead exemption.[69]

B. *Market Share*

While market share is one of the primary indicators courts use in finding monopolistic activity by corporations,[70] one federal court determined, in *Cape Cod Food Products v. National Cranberry Association*,[71] that a cranberry cooperative could properly acquire 100% of the market if it did so by employing activities approved by Capper-Volstead such as cooperative marketing, purchasing, and selling agreements.[72] The critical difference between corporate and cooperative acquisition of an increased percentage of the market share is the means each employ to achieve such a share. When a corporation merges with another corporation and a market increase results, the merger may be challenged as monopolistic activity.[73] When one cooperative joins with another, however, the merger is presumed to be allowable because Capper-Volstead authorizes cooperatives to act together.[74] While it appears market control alone is not enough to find a cooperative guilty of maintaining a monopoly,[75] a determination of this issue has never been considered above the district court level, although approval of such activity can be inferred from certain Supreme Court cases.[76]

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67. *Id.* at 820-21.

68. *Id.* at 817-18.

69. *Id.* at 828-29. *See also* In Re Midwest Milk Monopolization Litig., 510 F. Supp. 381, 426 (W.D. Mo. 1981).

70. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (citing American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)). *Grinnell* held that a monopoly could properly be acquired by "superior product, business acumen, or historic accident" and that monopoly may be inferred from holding the predominant share of the market. *Id.* In *American Tobacco* the court found that 80% of the market share was a substantial minority. *Id. See also* Warlich & Brill, *supra* note 4, at 566.

71. 119 F. Supp. 900 (D. Mass. 1954).

72. *Id.* at 907.

73. Warlich & Brill, *supra* note 4, at 568.

74. 7 U.S.C. § 291 (1976).

75. Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. at 907.

76. Case-Swayne Co. v. Sunkist Growers, 389 U.S. 384, 388 (1968); Sunkist Growers v. Winkler & Smith Co., 370 U.S. 19, 24 (1962) (discussing cooperatives acting in conjunction with other cooperatives to gain greater market control).

C. *Bargaining*

The marketing function authorized in Capper-Volstead has also been interpreted by the courts to allow agricultural cooperatives to bargain and set a uniform price for their products, both as cooperative entities and in conjunction with other cooperatives.[77] In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*,[78] the Ninth Circuit Court of Appeals determined that potato producers could form separate bargaining associations to bargain with a potato processing company and to obtain a unified price.[79] It should be noted that the milk industry is somewhat unique because of government involvement in establishing milk prices.[80] This will be addressed in section V.

The preceeding analysis demonstrates that agricultural cooperatives will lose their Capper-Volstead status if they have non-producer members. It also reveals that judicial interpretation of "marketing" allows these organizations to act together to bargain and to gain control of a large market share. These rules are fairly straight forward. The complexity in Capper-Volstead interpretation arises in determining what actions cooperatives are allowed to engage in to achieve increased market share and bargaining powers.[81]

D. *Practices*

The first case in which the Supreme Court examined what practices agricultural cooperatives could properly use was *United States v. Borden Co.*[82] In *Borden*, the Court was asked to determine whether a milk cooperative that had acted in conjunction with non-cooperatives to control the Chicago milk market had violated the Sherman Act's prohibition against conspiracy to monopolize.[83] The Court held that a milk cooperative that engaged in such practices in conjunction with others was not protected by the Capper-Volstead Act and was liable for antitrust violations.[84] In addition, the *Borden* Court concluded that the Capper-Volstead section 2 prosecutorial power given to the Secretary of Agriculture was not exclusive, and that other parties could bring antitrust actions against agricultural cooperatives.[85]

The leading Supreme Court decision relied upon to determine whether

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77. MARKETING COOPERATIVES REPORT, *supra* note 6, at 18. *See* Note, *Agricultural Cooperatives: Price Fixing and the Antitrust Exemption*, 11 U.C.D. L. REV. 537 (1978).
78. 497 F.2d 203, *cert. denied*, 419 U.S. 999 (1974).
79. *Id.* at 215. *See infra* text accompanying notes 202-10.
80. Ring, *supra* note 10, at 346.
81. Warlich & Brill, *supra* note 4, at 583.
82. 308 U.S. 188 (1939).
83. *Id.* at 191.
84. *Id.* at 204.
85. *Id.* at 206.

an agricultural cooperative is operating within the sphere of Capper-Volstead protection is *Maryland & Virginia Milk Producers Association v. United States*.[86] In *Maryland & Virginia*, the Court examined the activities used by a milk cooperative which supplied approximately eighty-six percent of the milk to the Washington, D.C. area.[87] The Court found that the Maryland and Virginia Milk Producers Association was liable for antitrust action because it conspired with others to monopolize trade and to eliminate competition, and in furtherance of this activity it purchased the largest local dairy.[88] In so finding, the Court conducted an in-depth analysis of Capper-Volstead and defined a standard which is presently the cornerstone of antitrust actions against cooperatives, particularly milk cooperatives.[89]

The Court in *Maryland & Virginia* found, through examining the legislative history of the Act, that Congress enacted Capper-Volstead to place agricultural cooperatives on equal footing with corporations.[90] Thus, the Court concluded that when cooperatives engage in "predatory practices," they may be prosecuted for antitrust violations just like corporations.[91] Although the Court was examining a situation in which a cooperative was acting in concert with a dairy, the decision indicates,[92] and other courts have found,[93] that a cooperative engaging in predatory activity alone is still in violation of antitrust laws.[94]

The problem with the application of this standard lies in defining what exactly constitutes a "predatory practice."[95] The lower federal courts have found predatory practices to be present when a cooperative engages in discriminatory pricing,[96] boycotts,[97] restrictive membership and marketing agreements,[98] and picketing and harassment.[99] These appear to be purely

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86. 362 U.S. 458 (1960).

87. *Id.* at 458. The defendant milk cooperative engaged in a variety of anti-competitive activities, including purchasing a local dairy, interfering with trucking, boycotting a feed and farm supply store, and threatening dealers, all designed to achieve control of the local market. *Id.* at 468. *See also* Warlich & Brill, *supra* note 4, at 576.

88. *See* Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. at 471.

89. *Id.*

90. *Id.* at 466.

91. *Id.* at 467.

92. *Id.*

93. *See* Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420, 423 (3d Cir. 1968); Otto Milk Co. v. United Dairy Farmers' Coop. Ass'n, 388 F.2d 789, 797 (3d Cir. 1967); North Tex. Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189, 193-94 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019, 1023 (S.D. Tex. 1972).

94. Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. at 467.

95. Warlich & Brill, *supra* note 4, at 577. *See also* Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n, 725 F.2d 564, 569 (10th Cir. 1984).

96. Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d at 424-25.

97. North Tex. Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d at 195.

98. Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. at 1023-24.

factual determinations. Since the Supreme Court has yet to specifically define the term, confusion exists in the lower federal courts; as a result, judges have invoked "predatory practices" to justify their findings.[100] This confusion is particularly evident in recent milk cooperative decisions which reveal that the various federal circuits have struggled to determine which activities place a milk cooperative outside the Capper-Volstead exemption, and in violation of the antitrust laws.[101]

IV. Recent Milk Litigation

The 1980's have seen a large number of cases requiring the federal circuit courts to analyze Capper-Volstead's relationship to the present milk industry.[102] While some of these cases have defined "allowable activity,"[103] the majority of the litigation has further complicated a determination of what practices are predatory and unlawful, and thus outside Capper-Volstead protection.[104]

Two cases have been decided which considered whether the Capper-Volstead allowance for producers to engage in "handling"[105] included the hauling of milk.[106] In *Green v. Associated Milk Producers*,[107] a local milk hauler charged a milk cooperative with violating antitrust laws by conspiring with its employees, suppliers, and two other milk haulers to keep other haulers from competing for routes.[108] The cooperative had redrawn its own hauling routes and purchased additional routes, previously serviced by independent haulers, in an effort to make its hauling function more efficient.[109] In deciding that no antitrust violation had taken place,[110] the Eighth Circuit stated that cooperatives may not conspire with non-cooperatives.[111] No evi-

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99. *See* Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 388 F.2d 789, 797 (3d Cir. 1967).

100. Warlich & Brill, *supra* note 4, at 577.

101. *See* Green v. Associated Milk Producers, Inc., 692 F.2d 1153 (8th Cir. 1982); Alexander v. National Farmers Org., 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2108 (1983); United States v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980).

102. *See supra* note 101.

103. *See* Green v. Associated Milk Producers, Inc., 692 F.2d at 1156-57; United States v. Dairymen, Inc., 660 F.2d at 194.

104. *See* Alexander v. National Farmers Org., 687 F.2d at 1183-91; United States v. Dairymen, Inc., 660 F.2d at 194-95; Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1044-45.

105. 7 U.S.C. § 291 (1976).

106. Green v. Associated Milk Producers, Inc., 692 F.2d at 1157; United States v. Dairymen, Inc., 660 F.2d at 194.

107. 692 F.2d 1153 (8th Cir. 1982).

108. *Id.* at 1154.

109. *Id.* at 1155.

110. *Id.* at 1158.

111. *Id.* at 1157.

dence of a conspiracy was found in this case, however, and there was no relationship between the charged antitrust violations and the injury suffered.[112] The court further concluded that milk hauling was within the "handling" function proscribed by Capper-Volstead.[113]

The Sixth Circuit in *United States v. Dairymen, Inc.*[114] was also required to examine milk hauling. This case, however, concerned the imposition of exclusive hauling contracts which were part of a larger, concerted use of illegal activities.[115] The court in *Dairymen* determined that the use of such hauling contracts could be a violation of the antitrust laws if they were used with the specific intent to monopolize.[116] Thus a review of *Green*[117] and *Dairymen*[118] leads to the conclusion that hauling agreements are an approved Capper-Volstead activity so long as they are not used with the intention to create a monopoly.

While the above analysis is fairly straightforward, other recent decisions attempting to define predatory practices and illegal activities have succeeded only in adding to the confusion.[119] In *Fairdale Farms, Inc. v. Yankee Milk, Inc.*,[120] a milk producer and dairy processor brought an action against a milk cooperative charging that the cooperative had engaged in price fixing, monopolization, and attempted monopolization.[121] The Second Circuit noted that "[i]t is apparent . . . that agriculture cooperatives were 'a favorite child of Congressional policy' "[122] and gave a very liberal interpretation to the Capper-Volstead exemption.[123] The court acknowledged that price fixing is usually considered a *per se* violation of the Sherman Act, but stated that such activity is proper for an agricultural cooperative because "setting the price is an integral part of marketing."[124] In addition, the court determined that "Capper-Volstead gives farmers the right to combine into cooperative

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112. *Id.* The court found that there was no evidence that the plaintiffs were injured by the cooperative's reorganization of its hauling routes. *Id.* at 1158.

113. *Id.* at 1157.

114. 660 F.2d 192 (6th Cir. 1981).

115. *Id.* at 193.

116. *Id.* at 194. *See also* Kinnett Dairies, Inc. v. Dairymen, Inc., 715 F.2d 520 (11th Cir. 1983).

117. Green v. Associated Milk Producers, Inc., 692 F.2d 1153 (8th Cir. 1982).

118. United States v. Dairymen, 660 F.2d 192 (6th Cir. 1982).

119. *See* Alexander v. National Farmers Org., 687 F.2d at 1183-91; United States v. Dairymen, Inc., 660 F.2d at 194-95; Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1044-45.

120. 635 F.2d 1037 (2d Cir. 1980).

121. *Id.* at 1039. *See also* Note, *supra* note 6, at 339.

122. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1043 (quoting 5 TOULMIN, ANTITRUST LAWS § 6.1 at 335 (1950)).

123. *Id. See generally* Note, *The Agricultural Cooperative Antitrust Exemptions*, *supra* note 4; Comment, 27 S.D. L. REV. 476 (1981-82).

124. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1040.

monopolies. The Act places no limit on combinations . . . ."[125]

The *Fairdale* court remanded the charge of monopolization to the district court and in so doing stated that "[a] cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harrassment,[126] boycotts,[127] coerced membership[128] and discriminatory pricing.[129] Neither may it use its legitimately acquired monopoly power in such a manner as to 'stifle or smother competition.' "[130] The court also determined that the second part of the *Grinnell* test[131] was not fully applicable to agricultural cooperatives and concluded that an agricultural cooperative monopoly could only be found when it was acquired by "predatory means."[132] The court acknowledged that "the formation, growth, and operation of a powerful cooperative is obviously a 'willful acquisition or maintenance of such power,' and will rarely result from 'a superior product, business acumen, or historic accident.' "[133]

The problem with this decision is two-fold. First, it is an outright determination that agricultural cooperatives should be held to a different standard than corporations when it has long been held that Capper-Volstead was designed to place cooperatives and corporations on an equal basis.[134] Second, while the court stated that agricultural cooperatives should not be allowed to acquire such power by the use of "predatory practices" that "stifle or smother competition," the court gives little guidance as to what those activities might be.[135] In fact, the *Fairdale* court appears to rely on the district court's good sense to reexamine the facts of this case and determine if such activities were present.[136]

In *United States v. Dairymen, Inc.*,[137] the Court of Appeals for the Sixth Circuit was required to determine if a milk cooperative had engaged in

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125. *Id.*

126. *Id.* at 1044 (citing Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 388 F.2d 789, 797 (3d Cir. 1967)).

127. *Id.* (citing North Tex. Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189, 195-96 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966)).

128. *Id.* (citing Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d 658, 665 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956)).

129. *Id.* (citing Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420, 423-24 (2d Cir. 1968)).

130. *Id.*

131. *Id.* at 1044-45. The test requires: "(1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. at 570-71.

132. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1044.

133. *Id.* at 1045 (citing United States v. Grinnell Corp., 384 U.S. at 570-71).

134. United States v. Borden, 308 U.S. 188, 204 (1939).

135. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d at 1044.

136. *See* Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 31 (2d Cir. 1983).

137. 660 F.2d 192 (6th Cir. 1981).

monopolistic activity. The *Dairymen* court, however, applied a much different standard than the court in *Fairdale Farms*.[138] First, the *Dairymen* court attempted to define what constituted predatory practices by stating: "The use of the term 'predatory practices' in cases construing the Capper-Volstead Act is intended to distinguish monopolies acquired through anticompetitive practices from lawful accretions of market power willfully created through the voluntary enrollment of members of cooperatives."[139] The court also determined that even if predatory practices were not present, an attempt to monopolize could still be found if "the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful."[140] In making this determination, the court applied the same standard to agricultural cooperatives that the Supreme Court has applied to find corporate monopolization.[141]

In addition, the *Dairymen* court gave further guidance for the district court to use on the remand of the case. The court in *Dairymen* acknowledged that the determination of monopolization must be based on a factual analysis of the markets in question,[142] and suggested that the district court look at the "intent" of the parties involved to see if there were "less exclusionary methods" that could have been used.[143] The court also noted that "the most important inquiry is whether these contracts were intended to stifle competition or were intended to meet legitimate business purposes."[144] While it is still difficult to determine exactly what constitutes an antitrust violation, in *Dairymen*, the court established guidelines concerning where to look and what to look for in making such a determination.[145]

The best example of the difficulty in applying antitrust law and the Capper-Volstead Act to milk cooperatives is found in *Alexander v. National Farmers Organization*.[146] The National Farmers Organization (N.F.O.) had been formed in 1955 to engage in organizing and lobbying on behalf of farmers.[147] In 1969, the N.F.O. began participating in direct marketing for farmers.[148] In addition, in the late 1960's, milk cooperatives in the Midwest were

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138. *Id.* at 194-95.

139. *Id.* at 194.

140. *Id.* (citing Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951)). While the "*Grinell* test" discussed and rejected by the *Fairdale* court focused on "willful acquisition" of monopoly power, the test adopted and employed by the *Dairymen* court examined not only "specific intent" but also the "dangerous probability" that monopolization would result. *Id.*

141. *Id.* at 195.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. 687 F.2d 1173 (8th Cir. 1982).

147. *Id.* at 1180.

148. *Id.*

in the process of massive consolidation.[149] The N.F.O. programs were not generally supported by the milk cooperatives, and as a result, both groups were competing for farmers' support. The actions that the N.F.O. and the milk cooperatives employed in their efforts to attain a larger market share formed the basis for the case.[150]

In *Alexander*, the Eighth Circuit was required to review 15,000 pages of district court records to determine if any of the parties involved had engaged in antitrust violations.[151] The complexity of this case is illustrated by a delineation of the parties and causes of actions involved. The plaintiffs in this action were a group of milk cooperatives who operated in Minnesota, Wisconsin, and parts of Southeast Missouri.[152] A milk cooperative, Mid-America, charged the National Farmers Organization, a farmers cooperative bargaining organization,[153] with engaging in illegal price-fixing and promoting a group boycott against the milk cooperative in violation of section 1 of the Sherman Act and section 4 of the Clayton Act.[154] The N.F.O. then counterclaimed against various milk cooperatives alleging attempted monopolization, unlawful monopolization, conspiracy to eliminate the N.F.O. as a competitor, and attempting to monopolize milk marketing.[155] Associated Milk Producers, another milk cooperative, then counterclaimed against N.F.O.[156] While a complete factual analysis of *Alexander* is not possible in this Note due to the case's complexity, a brief survey of the case reveals the standards that the Eighth Circuit employed in finding possible antitrust violations on the part of some of the milk cooperatives,[157] and in finding that none were engaged in by the N.F.O.[158]

The court in *Alexander* defined "predatory" as "lacking a legitimate business justification"[159] and stated that discriminatory price fixing and boycotts could be predatory[160] or illegal if unlawful intent was found.[161] The court determined, however, that the N.F.O. was not in violation of the antitrust law because the facts failed to prove such a violation.[162] The court found that while the N.F.O. had engaged in direct marketing, these activities were not done in an effort to destroy the cooperatives.[163]

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149. *Id.*
150. *Id.*
151. *Id.* at 1179.
152. *Id.* at 1180.
153. *Id.*
154. *Id.* at 1181.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1210.
159. *Id.* at 1183.
160. *Id.* at 1182.
161. *Id.* at 1183.
162. *Id.* at 1189.
163. *Id.* (noting that N.F.O. had not coerced farmers).

In analyzing the charges against the milk cooperatives, the court also relied on the factual determination that the milk cooperatives had engaged in predatory practices by short shipping and shipping late to a dairy to coerce buyers to eliminate competition,[164] and by using discriminatory pricing and coercive threats against another dairy.[165] The court stated that these actions should be considered as a whole to determine whether there was a predatory or unlawful purpose.[166] In addition, the court concluded that threats of litigation that some of the cooperatives directed toward various dairies constituted unlawful conduct.[167] The court also stated that while other overt acts such as certain membership and hauling terminations, acquisitions and mergers, and milk pooling practices might be lawful standing individually, taken as a whole they could be considered unlawful.[168]

The *Alexander* court, recognizing the difficulty in making these antitrust determinations, stated that "[w]hether the merger and acquisition campaign was an unlawful part of the conspiracy is thus an extremely close question of fact, further complicated by the sometimes hazy line between lawful and unlawful monopolization efforts when undertaken by Capper-Volstead cooperatives."[169] The court stated that the overriding issue was one of "tactics and intent,"[170] and that "the totality of the record" left no doubt that some of the milk cooperatives had employed unlawful tactics to eliminate competition.[171]

In deciding a case that had already consumed eleven years of litigation,[172] the *Alexander* court set out certain guidelines for determining whether predatory practices or unlawful activities were present.[173] While the court failed to define precisely what constituted a "predatory" or "unlawful" practice, it did acknowledge that such a determination must be made on a factual basis by examining the situation as a whole.[174] The court also suggested that the "intent" of the parties should be considered in making this decision.[175]

A review of the preceeding cases reveals various federal circuits struggling to apply a sixty-year-old law to the modern milk cooperative system.[176] The courts have applied various standards and have invoked the term

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164. *Id.* at 1196.
165. *Id.* at 1196-97.
166. *Id.* at 1198.
167. *Id.* at 1202.
168. *Id.* at 1204.
169. *Id.* at 1206.
170. *Id.*
171. *Id.* at 1208.
172. *Id.* at 1181.
173. *Id.* at 1206.
174. *Id.* at 1208.
175. *Id.* at 1206.
176. *See supra* notes 99-167 and accompanying text.

"predatory practices" to justify a finding of antitrust violations without precisely defining their rationale.[177] All of these decisions considered "intent" an important element in making an antitrust finding.[178] Their analysis is reminiscent of Justice Stewart's approach to defining pornography, "I know it when I see it,"[179] and has led to little predictability in the determination of cases. This unpredictability does a disservice not only to those charging milk cooperatives with antitrust violations, but also to cooperatives themselves which are unsure as to the activities in which they may properly engage.[180]

V. The System and Administrative Analysis

One of the difficulties involved in Capper-Volstead application today is that the milk industry has changed radically since the Act's inception.[181] Prior to 1922, the milk production and marketing system of this country was composed primarily of family farmers and independent dairies.[182] The introduction of pasteurization[183] and the passage of the Capper-Volstead Act allowed these family farmers to join together in processing their product.[184] This, in turn, resulted in dairy farmers being able to deal in the market place from a much stronger bargaining position.[185]

The growth of milk cooperative strength[186] and government regulation of the milk industry[187] has resulted in antitrust protection never envisioned in the early twenties.[188] The milk industry today is composed of four main groups, only some of which resemble the "dairy farmer" of 1920.[189] These four groups are producers, handlers, retailers, and producer cooperatives.[190] All of these groups have undergone somewhat of a transformation and today there is cooperative involvement in both production[191] and handling.[192] The number of farmers involved in dairy production is decreasing,[193] while cooperative involvement in the milk industry has increased.[194] Industry concen-

177. *Id.*
178. *Id.*
179. Woodward & Armstrong, The Brethren 198 (1979).
180. Marketing Cooperatives Report, *supra* note 6, at 18.
181. *See generally* Milk Marketing Report, *supra* note 8.
182. *Id.* at 19.
183. *Id.*
184. Antitrust Immunities Report, *supra* note 12, at 11.
185. Milk Marketing Report, *supra* note 8, at 46-48.
186. *Id.* at 166-72.
187. Antitrust Immunities Report, *supra* note 12, at 14-17.
188. Comptroller General's Report, *supra* note 12, at 16.
189. Milk Marketing Report, *supra* note 8, at 157.
190. *Id.*
191. *Id.* at 161.
192. *Id.* at 164.
193. *Id.* at 157.
194. *Id.* at 164.

tration in milk production has intensified in recent years, in part because of the introduction of less perishable dairy products with a national market.[195] In addition, there has been a trend towards vertical integration[196] by producer cooperatives.[197] While the number of these cooperatives has been decreasing, their net sales have been increasing.[198] In forty-six markets nationwide, ninety percent of the producers belong to cooperatives.[199] There has also been a recent trend toward regional mergers of milk cooperatives[200] with three regional cooperatives, Associated Milk Producers, Inc. (AMPI), Mid-America Dairymen, Inc. (Mid-Am), and Dairymen, Inc. (DI) selling twenty percent of all the nation's milk in 1970.[201]

It should be noted that big is not always bad, and this complex cooperative system has provided a more efficient production system resulting in more milk per cow.[202] While there is some concern that large agricultural cooperatives pose a danger to the small family farmer,[203] these farmers often argue that cooperatives are necessary for their survival.[204]

Another radical change in the farm industry has come through stock-based corporate membership in agricultural cooperatives.[205] While corporate involvement in the dairy industry does not appear to be widespread, it does denote a change in the farm structure that could affect Capper-Volstead interpretation.[206] The Supreme Court has yet to discuss this issue.[207]

This brief discussion of the changes in the composition of the milk industry is not meant to judge which system is better, but rather to note the complexity which is present today and how different it is from the farm structure of 1922, when each family farmer produced and marketed his milk individually.[208] Today the courts are required to apply the Capper-Volstead Act to a much stronger and more powerful industry, capable of acquiring

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195. *Id.*

196. *See id.* at 189. Vertical integration involves increasing involvement in all facets of production, from raw materials to delivery, while horizontal integration is achieved by controlling one area of production. *Id.*

197. *Id.* at 165.

198. *Id.* at 166.

199. *Id.* at 167.

200. *Id.* at 169.

201. *Id.*

202. *Id.* at 159.

203. COMPTROLLER GENERAL'S REPORT, *supra* note 12, at i. Small herds, less than 20 cows, represented less than 7% of the total milk production by 1973. *Id.*; MILK MARKETING REPORT, *supra* note 8, at 159.

204. COMPTROLLER GENERAL'S REPORT, *supra* note 12, at 14.

205. *Id.* at 30.

206. *Id.* at 33.

207. MILK MARKETING REPORT, *supra* note 8, at 22; MARKETING COOPERATIVE REPORT, *supra* note 6, at iv.

208. MILK MARKETING REPORT, *supra* note 8, at 19.

larger market control.[209]

The milk industry is unique, compared to some other areas of agriculture, because of extensive government involvement in establishing milk prices.[210] The Agricultural Adjustment Act[211] allows the Secretary of Agriculture to enter into marketing agreements with the producers, processors, and handlers of agricultural products, and exempts this activity from antitrust prosecution.[212] This Act was passed in 1933, during the depression era, to preserve "an orderly marketing process for various agricultural commodities," and to provide a support for farmer's income.[213]

The milk industry specifically is protected by milk marketing regulation that has been described as "one of the most complex regulatory schemes the mind of man has yet devised."[214] This legislation allows the Secretary of Agriculture to set the minimum price dairy processors must pay for grade A milk.[215] Critics have argued that this system has fostered monopoly rather than competition,[216] resulting in increased costs for the consumer and taxpayer.[217] Recent passage of more milk regulations, however, demonstrates that protection of milk production takes precedence, in the eyes of Congress, over consumer and taxpayer interests.[218]

While Capper-Volstead may or may not be adjusting to a changed milk industry, there is one portion of the Act that has never been effective. Section 2 of the Act authorizes the Secretary of Agriculture to take action against any cooperative that "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced."[219] The United States Department of Agriculture has never initiated such an action, but it has investigated complaints made by outside parties.[220] It appears that in each of these cases the Department found no undue price enhancement.[221] This lack of action prompted the Justice Department to state that "it might be fairly assumed that in at least some cases since the passage of Capper-Volstead in 1922 consumer prices have been unduly enhanced as a result of collective price setting by farmers."[222] Because of the Secretary of

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209. *Id.* at 121-46.

210. ANTITRUST IMMUNITIES REPORT, *supra* note 12, at 13-14. *See generally* Ring, *supra* note 10.

211. 7 U.S.C. §§ 601-59 (1976).

212. ANTITRUST IMMUNITIES REPORT, *supra* note 12, at 13.

213. *Id.*

214. *Id.* at 14.

215. Ring, *supra* note 10, at 347.

216. *Id.* at 352.

217. *Id.* at 354.

218. Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128.

219. 7 U.S.C. § 292 (1976). *See also* Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623 (1980).

220. COMPTROLLER GENERAL'S REPORT, *supra* note 12, at 18.

221. *Id.* at 19.

222. ANTITRUST IMMUNITIES REPORT, *supra* note 12, at 12.

Agriculture's lack of action, the term "undue price enhancement" has never been defined.[223] It should also be noted that if the framers of Capper-Volstead intended for the Secretary of Agriculture's section 2 powers to act as a check on the exemption given to agricultural cooperatives in section 1, it has proved ineffective to say the least. It may be unreasonable to expect the Department of Agriculture to police its own industry.[224] If this power is to be effective, it should be given to a disinterested party.[225]

The courts' difficulties in applying Capper-Volstead, the growth of agricultural cooperatives in both size and market share, and the Secretary of Agriculture's failure to enforce his section 2 power have led to government reports analyzing the situation and calling for various solutions.[226] All of these studies acknowledge the very important role cooperatives have played and continue to play in our modern agricultural system.[227] Each of them, however, calls for reinterpretation, clarification, or changes in the Act.

Predictably, the study done by the Department of Agriculture calls for no changes in the Capper-Volstead exemption and predominantly discusses how and why the exemption is necessary for a healthy farm economy.[228] The Department of Agriculture does, however, recognize the problems in present Capper-Volstead application and suggests clarification of the Act.[229] This study recommends "adoption of a policy defining the scope of the Capper-Volstead exemption and the principles followed in determining cases of undue price enhancement" and suggests this would "lessen . . . uncertainty and promote public understanding of the role of cooperatives."[230] Department of Agriculture publications acknowledge that the exemption is under attack,[231] and state that if cooperatives want to be treated differently under the law they will have to justify this treatment "in a way that the administrative law judges, hearing officers, and members of Congress can accept and explain to the electorate."[232]

In contrast to this position, studies by the Department of Justice suggest sweeping changes in federal milk marketing regulation[233] to allow a much less regulated market.[234] In addition, the Department of Justice calls for amendment of Capper-Volstead to prevent acquisition of market power

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223. MARKETING COOPERATIVES REPORT, *supra* note 6, at 37.
224. COMPTROLLER GENERAL'S REPORT, *supra* note 12, at 20.
225. *Id.*
226. *See supra* notes 6, 8 and 12.
227. *Id.*
228. MARKETING COOPERATIVES REPORT, *supra* note 6, at 30.
229. *Id.* at iii.
230. *Id.* at ii.
231. *Id.* at 7.
232. 47 U.S. DEPT. OF AGRICULTURE, FARMER COOPERATIVES 6 (1981).
233. MILK MARKETING REPORT, *supra* note 8, at 496.
234. *Id.* at 574.

by cooperative merger,[235] and to strengthen the section 2 power.[236] The Department states that reform of milk marketing acts and of the antitrust exemption need to be done together to achieve the goal of curbing cooperative monopolization.[237] As a less effective alternative, they call for enforcement of existing law to prevent anticompetitive mergers by milk cooperatives.[238]

A more balanced approach than either of the preceeding two is presented by a study undertaken by the Comptroller General.[239] While this report acknowledged the need for more effective controls to ensure that agricultural prices are not unduly enhanced,[240] the GAO expresses the opinion that this can be achieved without legislative changes.[241] In the alternative, the Comptroller General's report recommends that the Secretary of Agriculture "establish an enforcement and monitoring system so that cooperatives do not use monopolistic or other unfair trade practices to raise prices unduly" and "develop a set of cooperative conduct principles with the Federal Trade Commission and the Department of Justice."[242]

VI. Proposed Solutions

That changes are needed is evidenced by the volume of paper being generated by both governmental studies and by legislative opinion discussing this topic. The ideal solution to this problem would be legislative review of the current milk production system, its present legislative regulation, and the antitrust exemptions to determine what the legislative goals are, whether they be for a free or highly regulated market. After making this determination, Congress should enact legislation to: 1) define the size of a market share that a cooperative is allowed; 2) enumerate which activities a cooperative can properly engage in; and 3) place the supervision of such activity with someone less interested than the Secretary of Agriculture.

It appears, however, such legislation will not be forthcoming in the near future. The government studies examined in this Note were all done in the late 1970's and Congress seems to have taken little notice of them. In addition, passage of recent milk marketing legislation seems to indicate Congress's preference for piece-meal legislation involving the milk industry.[243]

Thus, if any semblance of order is to be brought to this area of the law,

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235. *Id.* at 575.
236. Antitrust Immunities Report, *supra* note 12, at 12.
237. Milk Marketing Report, *supra* note 8, at 576.
238. *Id.* at 575.
239. *See* Comptroller General's Report, *supra* note 12.
240. *Id.* at 27.
241. *Id.*
242. *Id.* at i.
243. Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 (Congress created a paid set-aside program, in an effort to lower milk production, and lowered the milk support price by 5%.). *See* Note, *Establishing Bargaining Units In Agricultural Marketing*, 68 Va. L. Rev. 1293 (1982).

it appears that it will have to be done by the Supreme Court. Perhaps, as has been argued by the Department of Agriculture: "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."[244] If this is true, Supreme Court reinterpretation of Capper-Volstead in relation to milk cooperatives is necessary to establish equitable and definitive standards.

The Supreme Court must devise a workable test for the courts to make sense out of the confusion which exists as to what milk cooperatives may and may not do under Capper-Volstead. If the lower federal courts are given definitive guidelines, cooperatives will know the limits and hopefully operate within them. In addition, more uniformity will exist among the various federal circuits with all cooperatives being held to the same standard.

Congress intended, and the Supreme Court has reiterated the belief, that agricultural cooperatives should operate on an equal basis with corporations.[245] Whatever test is devised, it should take this goal into consideration. The differences in cooperative versus corporate growth patterns and marketing activity must also be considered. Thus, applying a purely corporate antitrust standard to a cooperative will not work, as is evidenced by the court's unsuccessful attempt to do so in *Fairdale Farms, Inc. v. Yankee Milk, Inc.*[246]

In *United States v. Dairymen, Inc.*,[247] the court adopted a previously used corporate test[248] in addition to retaining the standard of "predatory practices" to define what constituted cooperative antitrust activity.[249] A review of all the recent milk cooperative litigation shows this analysis to be workable.[250]

Like other courts, the *Dairymen* court determined that cooperatives are in violation of the antitrust statutes if they are engaged in "predatory practices."[251] The court went on to state that predatory practices are those practices directed at other persons in an effort to restrain and suppress competition.[252] In addition, the court said any activity, predatory or not, would be illegal if it could be found that such activity was anticompetitive, was done with the "specific intent" to monopolize, and had a "dangerous probability"

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244. MARKETING COOPERATIVE REPORT, *supra* note 6, at 2.

245. Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 459 (1960).

246. 635 F.2d 1037, 1045 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981). *See supra* notes 131-33 and accompanying text.

247. 660 F.2d 192 (6th Cir. 1981).

248. *Id.* at 194.

249. *Id.*

250. *See supra* text accompanying notes 112-80.

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

252. *Id.* (test used by the Supreme Court in *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951), a corporate antitrust action).

of succeeding.[253] The *Dairymen* court also stated that consideration should be given to whether a cooperative could have achieved its legitimate goals through less exclusionary methods.[254] While acknowledging that a determination of corporate antitrust behavior, like any other antitrust determination, must hinge on a factual analysis,[255] the *Dairymen* court established tools to be used in such an analysis.

A distillation of the *Dairymen* approach should be adopted if, and when, the Supreme Court decides to reconsider Capper-Volstead's application to the milk cooperative system. Such a test could be stated as follows: A cooperative may be found in violation of the antitrust statutes (1) if any of these activities are predatory or (2) if its actions are intended to stifle competition and (3) there is a dangerous probability they will be successful. This approach takes into consideration the growth and market functions allowed cooperatives by Capper-Volstead, and yet holds these cooperatives to a standard similar to that which is used for corporations. Cooperatives may engage in these activities so long as they are not done for a purely anticompetitive motive and effect. The application of such a test would decrease anticompetitive activity among cooperatives which, in turn, would result in decreased litigation in this area.

VII. Conclusion

This Note has examined the Capper-Volstead antitrust exemption for agricultural cooperatives and specifically its application to the milk industry. In so doing, certain areas of concern become evident. First, the milk industry today is radically different from the farm system in operation at the Act's inception. As a result, the Act has, of necessity, been judicially interpreted in light of today's milk industry. Second, decisions by various federal courts have led to differing standards for milk cooperatives to conform. Consequently, milk cooperatives have little guidance as to what activities are proper and increased litigation has resulted. Third, this situation has led to government agency studies developing varied solutions to rectify this situation, but Congress has chosen not to provide a solution. In conclusion, the only available remedy for this situation rests with the Supreme Court. Its reinterpretation of Capper-Volstead is needed to establish a workable test to give cooperatives guidelines and to place cooperative and corporate antitrust activity on an equal basis.

Carla Tolbert Cook

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253. *Id.* at 195.
254. *Id.*
255. *Id.*