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## Agriculture Law





# Agricultural Antitrust Pitfalls

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Many prominent grocery store food brands are marketed under the names of well-known agricultural cooperatives comprised of farmers from across the country, including Maryland. According to the USDA, the gross revenue of domestic cooperatives and their member farmers tops \$128 billion annually and accounts for over 2 million jobs. U.S. antitrust laws prohibit competitors from working together to restrain trade, *i.e.*, to collude on pricing or reduce supply. See 15 U.S.C. § 1 (2012). However, in the early 1900s, Congress encouraged farmers to work together through cooperatives to jointly bring their products to market, and to even set prices, although this would ordinarily violate antitrust laws. The theory was to provide farmers with greater bargaining power in their dealings with profit-seeking middle men without unduly raising consumer costs. To assist in this goal, Congress enacted the agricultural antitrust exemption contained in the Capper-Volstead Act of 1922.



## Capper-Volstead Act

The Capper-Volstead Act allows “farmers, planters, ranchmen, dairymen, nut or fruit growers [to] act together in associations, ... in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.” 7 U.S.C. § 291 (2012). “Marketing” has been interpreted broadly to include not only jointly selling products, but actual price fixing and withholding products from market. *See Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 466 (1960);

*United States v. Hinote*, 823 F. Supp. 1350, 1354 n.8 (S.D. Miss. 1993). The Act, however, places certain structural requirements on cooperatives, including that all members must be farmers/producers, the cooperative must be “operated for the mutual benefit [its] members” and “shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.” 7 U.S.C. § 291.

The past decade has witnessed significant legal attacks on Capper-Volstead-Act cooperatives and their members. Numerous antitrust law-

suits have been filed seeking hundreds of millions of dollars from farmers who have done their best to comply with their cooperatives’ antitrust requirements. Cooperatives and farmers in the mushroom, milk, potato, egg, and broiler industries have defended large antitrust lawsuits. In an attempt to avoid the potential Capper-Volstead Act’s antitrust exemption, plaintiffs often claim the defendants’ conduct falls outside of the Act’s protections and/or the structure of the cooperative is improper. If plaintiffs are successful, the results can be staggering.

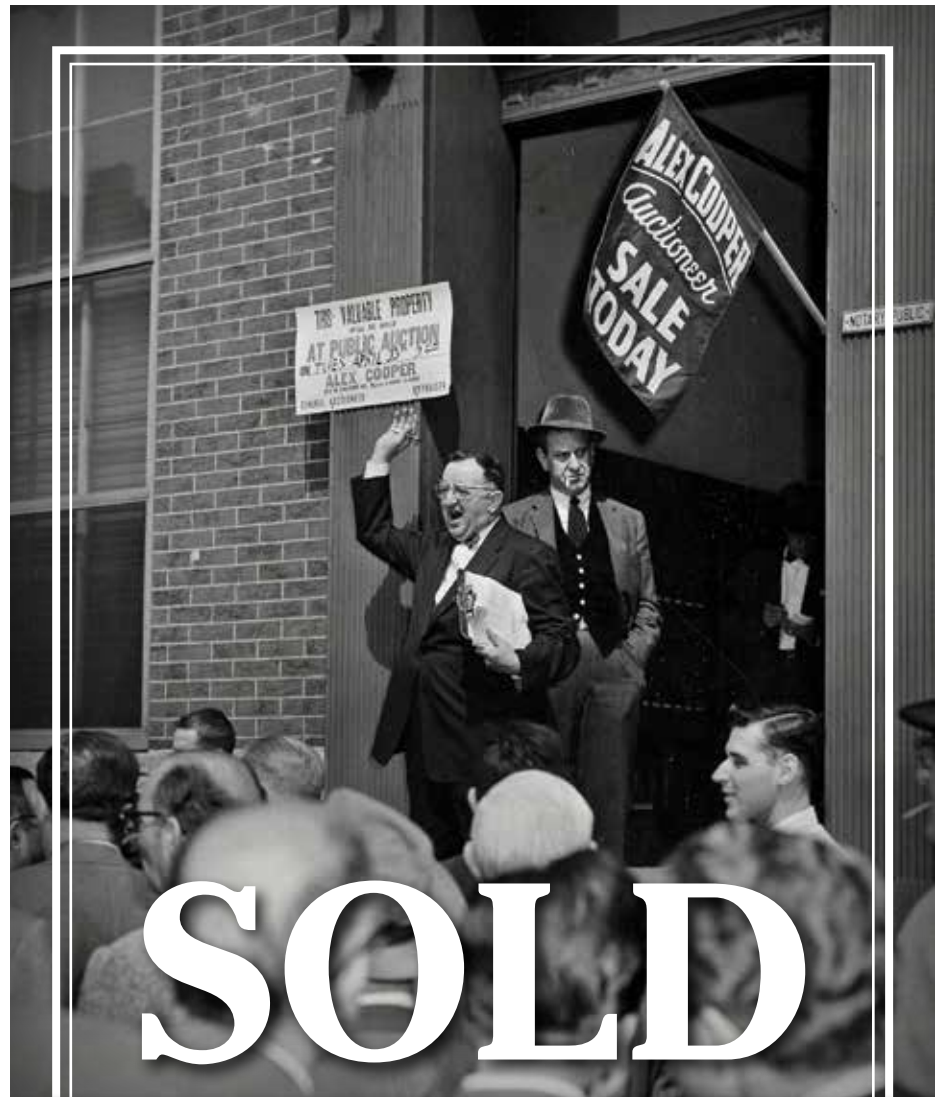


Damages are trebled if proved and successful plaintiffs may also recover attorney's fees. 15 U.S.C. § 15 (2012). State antitrust laws may also be invoked in certain circumstances. Recent examples follow.

## Mushrooms

Mushroom growers and one of their cooperatives have defended a supply management program since 2006 when they were first sued for alleged antitrust violations in Pennsylvania federal court. Complaint, *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 2:06-cv-00620 (E.D. Pa. filed Feb. 10, 2006). Plaintiffs claimed that, starting in 2001, the cooperative and its members agreed to increase prices and reduce supply by, among other things, purchasing mushroom farms and reselling the land with restrictive deed covenants preventing its use as mushroom farms. The Mushrooms plaintiffs argue that such conduct is not protected by Capper-Volstead because the Act does not protect pre-production supply management activities, monopolization of trade, or suppression of competition with non-members.

Additionally, plaintiffs alleged, and the court agreed, that the cooperative and its members are not Capper-Volstead protected because at least one member of the cooperative was not a true "farmer" under the definition of the Act. The alleged non-farmer defendant was the sister corporation of an actual farmer and had the same ownership as the non-farmer entity. However, the court found that because, among other reasons, the owner signed the cooperative membership form in the name of the non-farmer entity (which defendants



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argued was by mistake), neither the cooperative nor its members were protected by the Capper-Volstead Act.

## Milk

Dairy farmers and their cooperatives recently settled a nationwide antitrust class action involving supply management allegations. *See* Complaint, *In re Fresh Milk Pricing Antitrust Litig.*, No. 4:11-cv-4766 (N.D. Cal. filed Sept. 26, 2011). Plaintiffs claimed that dairy farmers were paid by a cooperative to voluntarily retire complete herds of milk cows and stay out of the market for one year. Non-members could allegedly participate in the program as well. The herd retirement program allegedly increased raw milk prices \$9 billion over approximately seven years.

Plaintiffs claimed that pre-production supply management - retiring cows before they could produce milk - was not protected conduct under the Capper-Volstead Act. Dairy farmers have already agreed to settle the indirect purchaser claims, meaning claims made by people who purchased milk and milk products at grocery stores, for \$52 million. Several related actions remain pending.

## Potatoes

The potato industry has also faced antitrust lawsuits for attempting to manage supply. *See* Amended Complaint, *In re Fresh & Processed Potatoes Antitrust Litig.*, No. 4:10-md-02186 (D. Idaho filed Dec. 13, 2010). Plaintiffs complained that farmers, through regional and nationwide cooperatives, violated the antitrust laws by limiting potato planting acreages and paying farmers to destroy existing stock and/or not grow addi-

tional potatoes. Defendants were not entitled to Capper-Volstead Act protections, according to plaintiffs, because their cooperatives included packers and other non-farmer entities.

In 2015, defendants settled direct and indirect purchaser class actions. The settlements include both monetary (\$19.5 million to retail potato purchasers and \$5.5 million to indirect purchasers) and injunctive relief. As part of the injunction, defendants were "prohibited from participating in agreements setting the number of potato-plantable acres or otherwise setting the amount or volume of potatoes that any potato producer will grow." The remainder of the case settled in December 2016.

## Eggs

In 2008, direct and indirect egg purchasers filed antitrust class actions alleging that sixteen egg farmers and two of their cooperatives engaged in a conspiracy to raise the price of shell eggs and egg products by reducing supply. Complaint at 41-55, *In re Processed Egg Products Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. filed Jan 4, 2013). Several direct actions by other plaintiff groups followed. The farmers allegedly increased cage space requirements for layers, coordinated molting schedules and flock reductions, and exported eggs at a loss in order to reduce domestic supply. Again, plaintiffs argued that pre-production supply management is not protected under the Capper-Volstead Act.

Plaintiffs also contested the Capper-Volstead Act status of the cooperatives because at least one of the defendants was allegedly not a farmer. The court agreed, in part, with plaintiffs and ruled that one of the

two cooperatives involved was not a Capper-Volstead protected organization because one of its members was not a farmer/producer, potentially exposing certain defendants to hundreds of millions of dollars in alleged damages.

Since the litigation's inception, several defendants have settled with certain plaintiffs, paying over \$100 million. Eight defendants remain in at least one of the actions.

## Broilers

In the most recent case, filed in September 2016, a putative class of direct purchasers of broiler chickens filed suit in federal court in Chicago against thirteen of the largest domestic broiler processors for alleged violating Section One of the Sherman Act beginning in January 2008 when the processors purportedly started to jointly reduce broiler production in order to raise prices. Class Action Complaint at 1, *Maplevale Farms, Inc. v. Koch Foods, Inc.*, No. 1:16-cv-08637 (N.D. Ill. filed Sept. 2, 2016). According to the complaint, the named defendants controlled 90 percent of the U.S. broiler market. During the period of the alleged broiler reductions, plaintiffs assert broiler market prices rose approximately 50 percent while at the same time, feed costs - a primary expense in raising broilers - fell approximately 20 percent to 23 percent. Plaintiffs contend this dramatic rise in prices is directly attributable to the defendants' alleged conspiracy to reduce broiler supply.

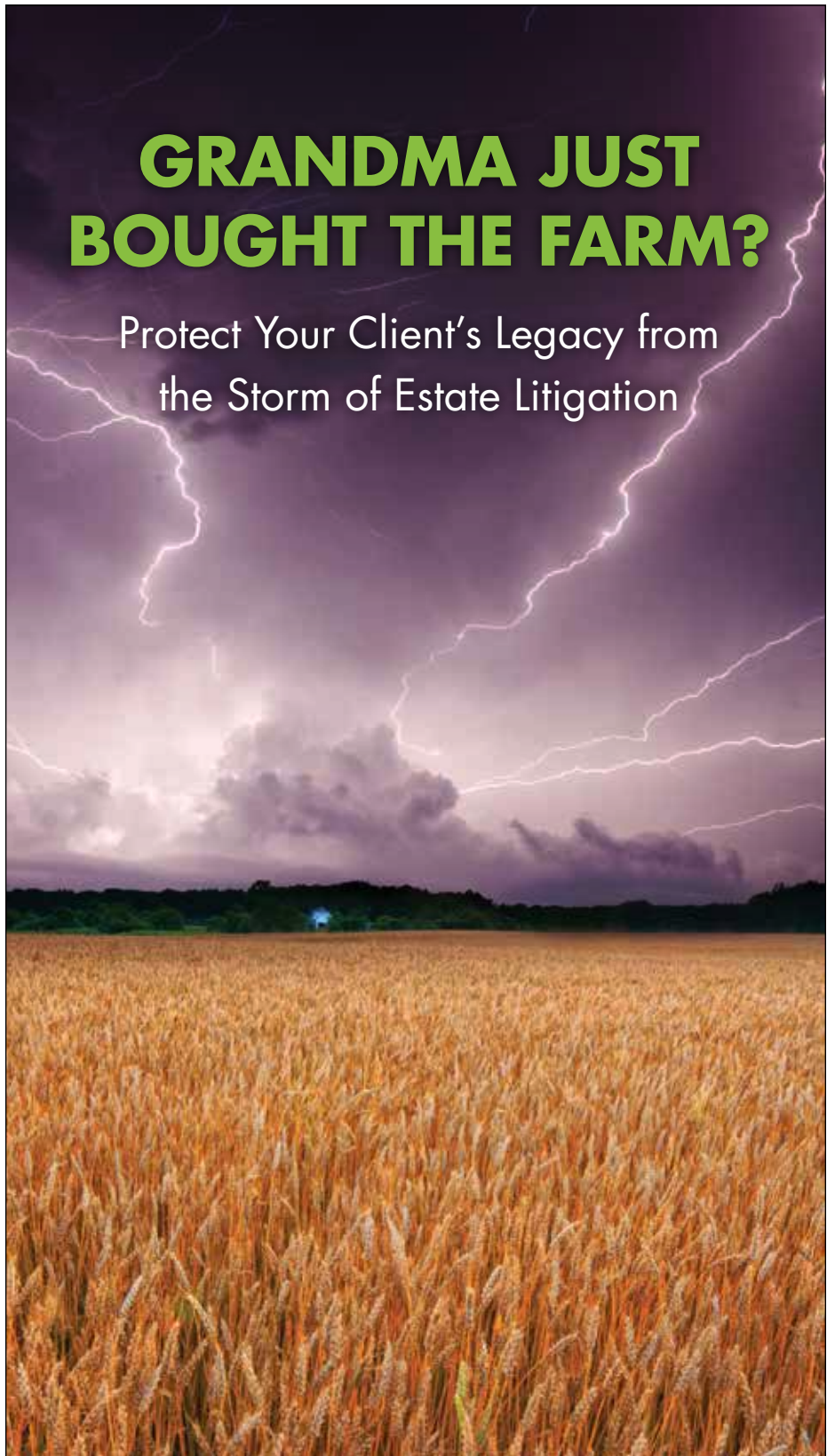
The case is based on statements that processors made at various industry meetings and public and private communications starting in 2008, in which individual processors

allegedly encouraged the rest of the industry fall in line and reduce supply. The complaint identifies over 40 purported supply reductions by defendants between January 2008 through August 2012. Finally, to enforce the alleged conspiracy, the complaint claims that defendants policed each other and made sure all companies were complying with the production cuts through the use of a private agricultural statistics and data collection company. Three additional direct purchaser class actions were filed in September and October 2016, as well as an indirect purchaser class action in September. Short of a quick settlement, broiler processors may be facing a decade (or more) of litigation. It is too early to determine whether or not the Capper-Volstead Act will be an issue in the litigation.

### Legal Challenges

The Capper-Volstead Act antitrust exemption has undergone great scrutiny by both plaintiffs and the courts. In the two most recent decisions on the subject, both the *Mushrooms* and the *Eggs* courts found that the inclusion of a single non-farmer member destroyed the Capper-Volstead immunity for both the cooperative and all of its farmer members. The *Mushroom* defendants appealed the decision to the Third Circuit, and while the court declined to reach the merits of the issue, it held “whether the arguably inadvertent inclusion of an ineligible member strips an agricultural cooperative of Capper-Volstead protection is both serious and unsettled.” *In re Mushroom Direct Purchaser Litig.*, 655 F.3d 158, 164 n.4 (3d Cir. 2011).

Given all of this, there is uncertainty for the ordinary farmer who has done



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everything it can to comply with its cooperative's antitrust requirements but can be pulled into one of these multimillion-dollar lawsuits?

A hypothetical farmer joins a Capper-Volstead-Act cooperative by submitting a membership application that requires it to certify that it owns land on which it grows crops. The same application is required from all members, and once it becomes a member, the farmer must recertify the same information every year. If a member subsequently fails to qualify as a "farmer" or fails to submit the required certification, the cooperative may revoke its membership. The farmer, in turn, also receives assurances that all of the programs offered by the cooperative are Capper-Volstead compliant. In this hypothetical example, assume there is a small member, who, when it joined the cooperative, was a farmer. In the intervening years, that farmer sold off its property and production facilities, but remained committed to the industry. Each year when the entity receives its cooperative certification form, it simply pays its dues and certifies in error that it is still Capper-Volstead compliant. Because it is a small entity, these mistakes go unnoticed.

Five to 10 years later, agricultural prices skyrocket, and the cooperative and its members are sued for alleged price-fixing or supply manipulation. A suit is filed and in discovery plaintiffs learn that the cooperative had a non-farmer as a member.

### Is There Room for "Good Faith"?

Plaintiffs will likely assert that the cooperative lost its Capper-Volstead protection the day the hypotheti-

cal farmer sold its last property and ceased production. If plaintiffs' argument is successful, it may expose the cooperative and its members to debilitating antitrust liability for all the intervening years. The cooperative's members, though, acted in good faith, but are exposed to substantial damages.

In real life, when presented with similar circumstances, some defendant-farmers have asserted a "good faith" Capper-Volstead affirmative defense. In the *Mushrooms and Eggs* cases for example, defendant-farmers argued that they should be protected by the Capper-Volstead Act's antitrust exemption because they acted reasonably and, in good-faith, and did the best they could to comply with the Capper-Volstead Act and their cooperatives' requirements.

In *Mushrooms*, the defendants argued among other things that they, in good faith, relied on advice of counsel that their conduct was legal; therefore, they should be entitled to the protections of the Capper Volstead Act. The court rejected the argument in large part because the advice of counsel defense is typically only available for claims that require specific intent - Section One of the Sherman Act does not require a specific intent. In *re Mushroom Direct Purchaser Litig.*, 54 F. Supp. 3d. 382,391 (E.D. Pa. 2014).

Similarly, in *Eggs*, certain defendants argued that a good-faith affirmative defense should be available to protect reasonable farmers from antitrust liability, just as it is available in the labor context. This is particularly true since both the labor exemption and the agricultural exemption are born out of Section 6 of the Clayton Act. Additionally, the *Eggs* defendants argued that

a good-faith antitrust defense had been recognized by other courts when faced with complex regulatory schemes that were difficult to navigate. Without such a defense, the defendants argued, innocent farmers could face ruinous liability.

Emphasizing that antitrust exemptions must be narrowly construed, the *Eggs* court agreed with the *Mushrooms* court and found that no such defense exists. In *re Processed Egg Products Antitrust Litig.*, 2016 U.S. Dist. LEXIS 133110, \*41 (E.D. Pa. Sept. 28, 2016). The court signaled that it was sympathetic to the farmers' situation, but "[u]ntil Congress may be motivated to turn its attention to this gaping hole, diligent policing by co-operative members of the membership rules is the only available protection."

### Practicalities

Laying the burden of embedding a good faith defense in the Capper-Volstead Act at Congress' feet does little to help farmers and their cooperatives today. Farmers have effectively become guarantors of their cooperative's Capper-Volstead Act status. As one federal appellate court has acknowledged, the issue is both serious and unsettled. It will take years, if not decades, of expensive litigation and appeals before court opinions coalesce to provide anything close to a definitive answer. Lobbying Congress for reform, though, may not present a much more appetizing option and may not be any more expedient.

In the interim, cooperatives and their farmer members must be diligent in policing their membership rolls and scrutinizing their collective conduct. Simply requiring annual





compliance certification may not be enough. Cooperatives should consider requiring background documents to confirm actual farmer status, which could then be verified and authenticated on a frequent basis. Cooperatives and farmers may also seek legal opinions or auditor statements confirming Capper-Volstead Act status. They should also consider adding an automatic expulsion clause to their membership agreements and by-laws. At least one court has looked favorably on such a clause in preserving the Capper-Volstead Act status

of a cooperative. *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1185 (8th Cir. 1982). Additionally, cooperatives may consider requiring members to indemnify the cooperative and/or its members for any errors committed in the certification process.

While cooperatives and their members do, and should, continue to play an important role in the U.S. agricultural industry, until either the Courts or Congress provide clarity as to the bounds of Capper-Volstead immunity, both farmers and cooperatives would be wise to seek advice from

antitrust counsel before rushing into a new joint undertaking. Otherwise, they may be confronted with a decade-long lawsuit as well.

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