

ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 55: Capper Volstead: Past, present and future

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: Good morning, good evening, or good afternoon, depending on when you're listening to this. This is Jay Levine, your host of the Antitrust Law Source Podcast and editor on the Antitrust Law Source blog articles and I am delighted to be joined by my co-chair of our antitrust group here at Porter Wright, Don Barnes. How ya doin' Don?

Don: I'm doing fine. Jay, it's always good to share some thoughts with you.

Jay: It for people who don't know Don, has literally written the book on antitrust to agriculture. There is a book written by him, we also have actually a law review article that came out about a year and a half ago. And so I've been wanting to get Don on the podcast for a while. And thank God we successful. So without any further ado, I've done you've done a lot of work in agriculture over your career. First, I guess tell everybody, you know, sort of a little bit about yourself and how you even got into this space?

Don: Well, you've all heard the story about the young lawyer walking down the hall one day and the senior partner reaches out and invites him into his or her office. Yes, precisely wouldn't happen to me. I was a young lawyer and my first job at a small but growing firm here in DC. And the senior partner who, who had formerly been the chairman of the Federal Trade Commission, one day call me

Jay: Earl Kintner?

Don: Earl Kintner. And Earl was a marvelous guy. He brought me called me into his office and I was introduced to the General Counsel and CEO of a major national agricultural cooperative. They had a particular problem. They had received conflicting legal opinions on a certain Capper Volstead issue from two different very prominent Boston law firms. And they were looking for a tiebreaker. So I became the tiebreaker.

Jay: You, I assume Earl didn't really have a lot of familiarity with Capper Volstead.

Don: No he didn't, but he was he was an excellent antitrust lawyer. Right. So he got me involved. I did the legwork, so to speak, consulted with her, we came up with an opinion provided to the client. And as they say, the rest is history.

Jay: Well, okay. Approximately when was this? I know we're gonna date you here. But aren't you aren't going to do this was I born?

Don: You are going to date me.

Jay: Was I born?

Don: What year were you born?

Jay: Okay, we'll go with your dating.

Don: This was approximately in the mid 70s.

Jay: So if this is in the mid 70s, was there a lot of concern in the ag industry about antitrust enforcement?

Don: It happened off and on. If you go back, historically, you'll find that there were two Supreme Court, landmark Supreme Court cases involving Sunkist

Jay: Right, Case Swayne.

Don: Case Swayne and Sunkist Growers versus Winkler and Smith. They were in the late 60s, early 70s. So in that period of time,

Jay: Right.

Don: interest in the antitrust exemption for agriculture was growing, because there was more activity in the courts and and in the regulatory agencies as well. So

Jay: Right. So because the 60s and 70s were sort of the the heyday that's also when Arnold was the from Arnold and Porter. That's when he was what was he the the head of DOJ or.

Don: Right he was the attorney general, I believe.

Jay: Right. And it was very interested in enforcing the antitrust laws vigorously, something that we may be seeing now again, interesting in and I guess the coops were under the microscope at some level.

Don: Yeah. And they continued to be particularly where the Department of Justice the antitrust division has been involved. The antitrust division has always had and probably rightfully so. A strong antipathy toward any antitrust exemption,

Jay: right? Obviously, it makes their jobs harder.

Don: And in particular, they have not spoken kindly about the Capper Volstead exemption. There have been various commissions over the years there was one in 1970. There was one in I believe, '79 and National Commission for review the antitrust laws and procedures, which have all recommended weakening the exemption. Sometimes the government has even supported repealing the exemption.

Jay: Okay.

Don: So that trend has continued sure to the present day.

Jay: That's not I mean, that's not specific to to agriculture. I mean, they don't like the McCarran Ferguson Act. They don't like any antitrust exemptions that preclude them from enforcing the antitrust laws in any way they deem appropriate.

Don: Right.

Jay: But interesting, so. So you in the mid 70s, you get called into Earl Kintner's office, and you do this legwork, and then sort of, okay, that is a research project. How did it snowball into becoming well, sort of, you know, somewhat of a career, and that someone in career

Don: Well, after, after that experience, Earl Kintner, who really developed a strong name recognition in the antitrust bar, he was contacted by another cooperative. And this cooperative was in a different commodity than the first cooperative I dealt with. But this cooperative had grown from a very small operation through mergers and acquisitions. They ended up acquiring about 136 or merging with 136 smaller coops from the Gulf of Mexico to the Canadian border.

Jay: Okay, so it's no longer small,

Don: no longer small, very large.

Jay: Gotcha.

Don: And when they became large, they became a very big target. To make a long story short lawsuit, antitrust lawsuits began to be filed against this cooperative by various classes. You name a class, mother's small supermarkets, large supermarkets,

Jay: Really?

Don: Yeah.

Jay: Wow.

Don: All kinds of consumer classes. Two states file their own separate antitrust and the federal government.

Jay: What were they suing about? The roll up of the mergers or they want to practice

Don: They wanted divestiture.

Jay: Okay.

Don: Government wanted divestiture.

Jay: Right.

Don: They also, the private suits were seeking damages.

Jay: Well, what was the conduct they were alleging unlawful

Don: Predatory conduct, conduct that the cooperative engaged in to induce some of the merger,

Jay: like bribery or coercion,

Don: something like that.

Jay: Gotcha.

Don: In addition, they allegedly engaged in coercive activities involving customers, to convince a customer to deal with them and not to deal with a competitor law, which put pressure on the competitor sure to join the bigger cooperative.

Jay: Okay.

Don: Now, the law, the major lawsuit, many of these were settled, there were consent decrees entered into with the state and federal government. And the private suits for the most part got settled. The main suit went to trial was a bench trial. The bench trial lasted a year and nine months.

Jay: Obviously, not consecutive days.

Don: Not consecutive days. Ended up with two trips to the Eighth Circuit.

Jay: This is your 20 plus year litigation.

Don: This is this is correct. From start to finish, this case, lasted 20 years and three months.

Jay: Okay, well, that'll give you a lot of experience and

Don: It certainly did.

Jay: So it took you from associate to partner to

Don: Exactly.

Jay: Okay, wow. So in this started when in the mid 70s,

Don: It started in the mid 70s, after my first encountered in the early 70s.

Jay: Ah, okay. So that's where you kind of really cut your teeth.

Don: Exactly, exactly.

Jay: So just stepping back for a moment for those in in agriculture or even just interested in agriculture. And has the practice changed since, let's say the mid 70s to now or how has it changed?

Don: It has changed in certain respects. It's become more sophisticated. And by that I mean this

Jay: That's because I got involved.

Don: That's right after you got involved, if you got involved, it became more cerebral. But what has changed is the the approach to the legal issues involved in the capper vaults, that exemption. Okay.

Jay: Okay.

Don: And by that, I mean, there are certain issues that are still unresolved.

Jay: Right?

Don: And it's an area of the law that has been evolving, if you will, and it still continues to evolve. That's what makes it exciting.

Jay: Right.

Don: What is a producer? The Act protects producers. okay, so save yourself well, What does it produce?

Jay: Right.

Don: Well, the Supreme Court addressed this issue in the United States versus national broiler marketing cooperative. That was in 77-78. And without getting into all the details, they found that one of the members of that cooperative was not a producer, because it didn't own the chickens. It didn't have a grow out facility. It had very little indicia of a farm rank, no dirt under their fingernails, so to speak.

Jay: Right.

Don: So that's one an issue, still an open issue, and it comes up, it's come up in contemporary antitrust cases involving cooperatives and other issues, vertical integration, how much vertical integration is too much.

Jay: Where you cease to become a producer and are now a processor.

Don: Right. And the whole purpose of the capper Volstead Act was to give the producer protection from the process.

Jay: Right. We're gonna talk a lot about that in a moment. But one of the interesting things is, you know, when I think I did a search for Capper Volstead, and whatever. I mean, it's amazing how many, or how few cases there actually are on it, which, as you said, leaves a lot of open questions. And, you know, sort of not a lot of definitive answers, but keeps keeps us on our toes. But yeah, I mean, have you found that, generally in ag, there have been periods of time where there's more interest in antitrust, and sometimes there's less interest?

Don: Definitely. There have been definitely swings, if you will. And the amount of interest the amount of litigation that's been instituted involving farmers co ops, and its overall, if you look at a trend, it's grown.

Jay: Yeah. Why do you think that is?

Don: Well, because number one, a lot of these issues are undecided.

Jay: Okay,

Don: So for the government and the plaintiffs bar...

Jay: Everybody thinks they have a shot.

Don: There's a lot to shoot at.

Jay: Right.

Don: And they have been taking their shots. Now, the plaintiffs bar has become very sophisticated. There are some very good plaintiffs lawyers who know a lot about the camphor bolts that and antitrust. And as you know, we've litigated against some of the best. But there's been more and more interest in the private plaintiffs bar

Jay: Right.

Don: Involving co ops in antitrust, I've been more and more lawsuit seeking treble damages, etc.

Jay: And I guess also. Well, the reason they're probably more is because there's, you know, there's more money at stake because the coops themselves have become bigger and therefore a bigger target.

Don: That's correct. And that is precisely one of the argument that the government makes regularly to reduce or circumscribe the effect of the Capper Volstead Act or even repeal it, the argument is, farmers don't need any it anymore.

Jay: Right.

Don: These coops are so huge, long term,

Jay: They are a billion dollar entities.

Don: They're billion dollar entities. And they don't need this protection anymore. The only problem with that is the numbers don't bear it out.

Jay: Right.

Don: If you look at the actual statistics, the people who purchased the companies that purchase the products from these cooperatives, from the farmer members, these cooperatives have grown two, three, four times bigger than the cooperatives themselves.

Jay: The relative growth has been exactly disproportionate

Don: Huge consolidation in the retail grocery industry.

Jay: Right.

Don: Just a couple of months ago, the Federation of Retail Grocers, submitted a petition to the to the FTC, to investigate the concentration in the retail grocery industry. These are the people who buy the farm products from the members of the coop. Okay, through the cooperatives. So,

when people say, Well, wait a minute, there's this huge, there's no longer a huge imbalance in bargaining power. That's a bunch of malarkey.

Jay: Right, right. Because you may have a billion \$2 billion Co Op, but you're facing a \$10 trillion, if you will. little hyperbole there, but yes, but the relative strength is, is still fairly uneven.

So I think the interesting thing is not many people know about the Capper Volstead Act, not many people, frankly, care about it, but in a way it really does affect almost everything we quite literally digest in a given day. Because it allows the cooperatives to have a functioning cooperative, which allows people to frankly fixed prices. Alright. And without it, Lord knows our food chain may actually operate.

Why don't we hold it here for now? And I think in our next podcast, we're actually going to talk about what the Capper Volstead Act is. We've sort of mentioned it a lot. We haven't explained, why it came into existence in the first place. I think we've alluded to it and sort of there. And although people talk about the Capper Volstead Act is really a web of law that exempts cooperatives and people in the ag from the antitrust laws. It's not just the Capper Volstead Act correct. So just to be precise, and let our listeners know, we'll sort of run through some what some of those are.

But I think this was a an excellent introduction. Thank you for joining me today, Don.

Don: My pleasure, anytime.

Jay: And this is Jay Levine. Again, the host of Antitrust Law Source you can reach me at the letter jlevine@porterwright.com or JayLLevine on Twitter. I'm on LinkedIn. Don, how can people reach you? What's your email?

Don: Email is dbarnes@porterwright.com

Jay: No Twitter, huh?

Don: No Twitter. no Instagram. No Facebook.

Jay: Okay, we've been successful in bringing him into the 21st century but there's still some more work to do right.

Don: Kicking and screaming.

Jay: Yes. For now have a great day.

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