

## ANTITRUST LAW SOURCE PODCAST WITH JAY LEVINE

### Episode 57: Part 3: 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 afternoon or good evening, depending on when you're listening to this. This is Jay Levine, your host at Antitrust Law Source. And I'm delighted to continue our podcast series on Capper Volstead and the agricultural industry as it relates to antitrust with my partner, Don Barnes. How're you doing Don?

**Don:** Jay, I'm doing fine up here and your palatial office overlooking a seat of power here in Washington DC.

**Jay:** Does the office envy come through any clearer? But we'll leave that for another time. So we left off last time talking about some of the elements of Capper Volstead and I think it behooves us to mention that there is a another exemption to the antitrust laws for specific practice. That exists. Right,

**Don:** right. That's correct. And that statute is called the Cooperative Marketing Act of 1926.

**Jay:** That's only four years after Capper Volstead, correct?

**Don:** Correct.

**Jay:** So what's the story?

**Don:** The story is, there seemed to be a sense in Congress, that farmers needed some additional protection for their collective activity, not only protecting them in their marketing efforts, their joint marketing efforts, but in activities that enhanced those marketing efforts, such as the collection of data, the collection of information, the exchange of information

**Jay:** Okay.

**Don:** So, this past the collective marketing act of 1926 provided an additional exemption, if you will, for the collection, exchange, dissemination of present and prospective and past product marketing and statistical data among Coop members.

**Jay:** Among each other or with other qualifiers?

**Don:** Correct with other qualified coops.

**Jay:** Okay. I mean, arguably, that could have been covered by Capper Volstead itself, but this was a belt and suspenders

**Don:** Correct.

**Jay:** Okay, so let's talk now a little bit about the United States Department of Agriculture. And I'm just curious as to what I mean, section two of the Capper Volstead Act obviously gives the Secretary of the Agriculture the power to bring a complaint, if it believes that anybody's engaged in monopolization and the like,

**Don:** And undue price enhancement.

**Jay:** Undue price enhancement. Right. But aside from that, what, if any, is their relationship to the Capper Volstead statute?

**Don:** Well, you've got to go back in history.

**Jay:** Ha, don't we always?

**Don:** Well, one of the things that the Department of Agriculture did, which really came out of the authority given to them in section two to police undo price enhancement, was the creation of what has come to be known as the Capper Volstead committee within the United States Department of Agriculture. There are three members of that committee. There are a series of federal regulations in the CFR identifying those members, and the membership consists of the General Counsel of the agency, the Undersecretary for marketing, and the Chief Economist.

**Jay:** For the USDA.

**Don:** So it's those three individuals.

**Jay:** Let's go back. The committee - why was it set up? And what did it do when it was first set up?

**Don:** Okay. Well, it was set up to police the Section Two authority, to police undo price enhancement.

**Jay:** They investigated any complaints or any issues.

**Don:** They were supposed to investigate any complaints. Now, I think it's been 101 years since the Act passed. And to my knowledge, there has only been one investigation conducted by this Capper Volstead Committee.

**Jay:** Yeah. So that just means that there haven't been any problems?

**Don:** Well, it depends on who you ask.

**Jay:** I guess it depends on who you ask, obviously plaintiffs might think otherwise. So if the committee was formed in order to deal with the section two, but clearly that isn't involving what, what they as a practical matter, do when the committee was first formed, what have they been doing? Or was it just in name only?

**Don:** Well, it's very unclear what they've been doing other than occasionally meeting and going to lunch. They've been very inactive. Now, there is one - it's non-public - but one of the investigations they undertook involved a cooperative, a multi-commodity cooperative in the southwest, and by that I mean a coop that handled different commodities.

**Jay:** Right.

**Don:** Okay. And this cooperative wanted to solicit and sign up foreign members. Members from Mexico. So they wanted to bring in tomato growers, onion growers from Mexico into this domestic United States cooperative. So the question that was posed to the Capper Volstead Committee, whether foreign members would destroy the exemption.

**Jay:** Okay.

**Don:** There was an opinion letter issued by the General Counsel's Office, which essentially said that a cooperative domestic cooperative may indeed have foreign members assuming all of the other requirements were met. Now, to my knowledge that has never been made public. I don't think you can find that by—

**Jay:** A FOIA request or anything.

**Don:** Well, FOIA requests, you probably can.

**Jay:** Okay, but it's not on their in their archives or online or anything.

**Don:** It's possible by now, it is, but it hadn't been for many years.

**Jay:** So I mean, well, does the USA comment on Capper Volstead? Can you go to them for an advisory opinion on them in ways that you can go to the DOJ or FTC?

**Don:** Typically, you go to the Department of Justice.

**Jay:** Right.

**Don:** A coop would go to the Department of Justice, okay, for that type of opinion. Rather than to the department itself. Although for certain commodity programs,

**Jay:** Right.

**Don:** There is an internal Capper Volstead review process. For example, for dairy cooperatives who operate under the Federal Milk Marketing Order system, okay. There is a requirement that the coop comply with the requirements of Capper Volstead Act. So the coop must fill out a form, attesting to its qualifications and submits it to the USDA. And if they meet the qualifications, then they're "certified" under that particular federal order to provide what are called Marketing Services, to the members of the coop.

**Jay:** Okay.

**Don:** Okay.

**Jay:** I realized that it gets a little bit more complicated. Who does the certification, USDA?

**Don:** USDA does, because otherwise, if the coop is not certified, the USDA will provide the marketing services for a value.

**Jay:** So other than this one instance or the like, it sounds like the USDA doesn't really do much with Capper itself.

**Don:** Not anymore. Now, that situation changed. Back in the 60s, 70s, and early 80s. Within the department, there was a section, a division, devoted exclusively to cooperatives, to the care and feeding of cooperatives, so to speak. That section was called the agricultural cooperative service. That was the name. And again, by its name, one, one could certainly tell what the mission to that entity was.

**Jay:** Okay.

**Don:** And their sole goal in life was to assist cooperatives with all kinds of problems from A to B. There was a director, a senior level director, and cooperatives could go in and actually sit down with the administrator of that division and talk about programs or issues.

**Jay:** Okay, so at this time was it sort of policy goal of USDA to encourage cooperatives and facilitate their existence and their success?

**Don:** Precisely.

**Jay:** Okay.

**Don:** Now, over time, the emphasis changed within the USDA. Why? Likely well, outside forces such as the Department of Justice. Department of Justice kept agitating to reduce the scope of the Capper Volstead exemption. For example, they would show up uninvited, so to speak, at federal milk ordered hearings.

**Jay:** Uh huh.

**Don:** And oppose the federal milk order hearings because the federal milk orders internally provided an antitrust exemption for the participants.

**Jay:** Right, who are basically selling at a floor.

**Don:** Exactly.

**Jay:** Okay.

**Don:** So there's almost been an antipathy between the goals of the Capper Volstead Act and the goals of a competition policy. They seem to be at loggerheads. So early on, the USDA seemed to have the upper hand in that regard. They were very helpful to cooperatives. They went out of their way to help cooperatives. One classic example, without mentioning any names, there was a litigation involving the cooperative. And there was a Capper Volstead issue of first impression.

**Jay:** Okay.

**Don:** The Department of Justice got wind of it. And they were considering intervening in the litigation.

**Jay:** Okay.

**Don:** Okay. To oppose the application of the Capper Volstead Act to that particular issue.

**Jay:** Right.

**Don:** At that time, the coop went to the USDA, met with the General Counsel's Office. Again, as an example of how back then, USDA was very helpful for cooperatives. The general counsel listened attentively, consulted with his or her staff, and basically told the Department of Justice, that if the Department of Justice intervened on behalf of the plaintiffs on this issue, that the Department of Agriculture would intervene on behalf of the Capper Volstead defendants. Needless to say, nothing happened. The lawsuit went forward.

**Jay:** Okay. And it makes sense that obviously DOJ does not like statutes to give any impediment to their enforcement. But the policy for the USDA was to try and help cooperatives which is obviously helped and strengthened by the Capper Volstead Act. But you said that changed over time, because essentially, they lost the upper hand?

**Don:** Well, they lost the upper faith. The Department of Justice, antitrust division became more and more aggressive, in attempting to undermine or limit the scope of the exemption. And over time, the agricultural cooperative service ceased to exist. The department then took the functions of the coop service, formed a new business unit within the department called the Rural Business Development Cooperative Service. Now, that entity is no longer focused on the care and feeding of cooperatives.

**Jay:** What are they focused on?

**Don:** That area is focused on energy, bringing internet service.

**Jay:** So it's infrastructure.

**Don:** It's for infrastructure.

**Jay:** Gotcha.

**Don:** It's more infrastructure and developing businesses. Not necessarily cooperative businesses, but rural businesses.

**Jay:** Gotcha. We want stuff out in the rural of healthcare and like, exactly. So I mean, before we close the segment, I mean, I guess the question is: so there's two different things going on, I can understand why the DOJ would have some antipathy towards Capper Volstead, because it stands in its way. But there's also sort of the larger view of cooperatives itself, that was prevalent at the USDA as cooperatives being a good thing, generally.

**Don:** Right.

**Jay:** And obviously, a lot of what a cooperative does is to do things that might otherwise be unlawful under the antitrust laws. But I mean, does the does the USDA no longer have a shine for cooperatives? Or have the cooperatives become so big that they just view them as a business and therefore the they don't have any special favor?

**Don:** Well, don't get me wrong. There are still many, many people at USDA who are strong believers in the value of agricultural cooperatives, to the farmers and to the general economy of the United States.

**Jay:** Okay.

**Don:** And they're there, and they're very helpful. The problem is, as you as you might have mentioned, the emphasis has changed. In other words, cooperatives have gotten bigger.

**Jay:** Right.

**Don:** There's been tremendous consolidation in the coop industry. But again, that doesn't tell the whole story because the consolidation in the agricultural processing industry, the customers of the coops.

**Jay:** And the retailers.

**Don:** And the retailers have grown exponentially far larger than coops have grown. So there's still that imbalance of bargaining power. USDA is still helpful, but the emphasis has changed. Now, that's not to say they weren't always concerned about other rural businesses.

**Jay:** Right.

**Don:** But the coops were not given basically their own division and their own administrator.

**Jay:** They're not the darlings they once were.

**Don:** They're not the darling they're once were. Still valued, but not the darlings they once were. And part of that is due, as I mentioned, to the pressure from the Department of Justice. You can still have a very productive meeting with people at the Department of Agriculture, but they now have a liaison understanding with DOJ.

**Jay:** Right.

**Don:** And if a cooperative is coming in, and they're coming in about an issue that might involve some competitive concerns, you'll show up at the meeting at USDA, and there'll be representatives from the antitrust division sitting across the table with the USDA representatives.

**Jay:** And of course, you know, DOJ and the antitrust division has a bureau that is devoted a couple things in it, but one of the things is agricultural. So it is an industry that is has a focus that DOJ.

**Don:** Right. I don't think any cooperative, at least any cooperative that I've ever encountered, is opposed to enforcement of the antitrust laws.

**Jay:** Right.

**Don:** Okay. They're opposed to doing so in a way that diminishes their legal rights under the exemption.

**Jay:** Right, but obviously, Capper Volstead embodies like policy to allow certain things for cooperatives. Unless that policy has gone away, it should be respected. You know, where that line is drawn? That's where you get sort of the battles.

**Don:** Right, correct.

**Jay:** Okay. And I think that's where we're going to end this one. Because I think the next our next segment is going to talk about where some of those battles through the years have been fought and won, lost, by everybody. But I hope you've enjoyed this podcast discussing Capper Volstead, especially its relationship with USDA. It is somewhat fascinating, and the whole concept of our food and agriculture and even though we're such a tech world and everything, again, you still got to feed everyone.

**Don:** That's true.

**Jay:** So, so we can never get far away from the land. And it's probably something we should we should remember more. But this has been Jay Levine, the host of your Antitrust Law Source, you can reach me at [jlevine@porterwright.com](mailto:jlevine@porterwright.com) or on Twitter at JayLLevine or on LinkedIn. I've been joined by my partner Don Barnes, you can reach him at

**Don:** [dbarnes@porterwright.com](mailto:dbarnes@porterwright.com) and I do not participate in any social media.

**Jay:** Ah, he says proudly. Well, maybe before the year's out, we can get him to open up a Twitter account. We'll have to teach them what to do. Make sure he doesn't get banned.

**Don:** That's always a possibility.

**Jay:** Always a possibility. I hope you guys have a great day. Take care.

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