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C O O P E R A T I V E S

Statement by

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C O O P E R A T I V E S

Introduction

The role of the cooperative must be considered in the light of two aspects of our national policy which have contributed greatly to our economic achievements. One of these is the antitrust laws, dedicated to the maintenance of free competition; the other legislation and public policy encouraging cooperation among producers and the development of cooperative associations. Since the two principles are at once concurrent and at times seemingly in conflict, it is inevitable that questions should arise about the compatibility of cooperatives and the antitrust laws.

The reasons for our public policy encouraging the growth of the cooperative movement is clear. It stems fundamentally from a desire to equalize the bargaining power of the individuals belonging to the cooperatives and the larger firms with which they find it necessary to do business. In the case of agriculture and labor, at any rate, Congress by various statutes exempting agricultural

cooperatives and union activities from the antitrust laws has implicitly recognized that efforts on the part of these sectors of the economy to develop market power differed from that of industry, the difference being that such efforts were the response of workers and farmers to the power of those to whom they sold their labor or products. 1/ The recognition of this difference continues, there being current pressure for new legislation to encoura and assist cooperatives. The U.S. News & World Report of June 22, 1964, for example, stated that the United States Secretary of Agriculture "is reported to be convinced that farm-marketing cooperatives — organized on a national scale with Government backing — are about the only way that the farmer can gain the bargaining power he needs to protect his market prices. Plans are afoot now to put more 'muscle' into co-operatives." 2/

In addition, the antitrust enforcement agencies must take into consideration groups of small businesses banding together either to increase their purchasing power or to distribute their products more effectively. These groups have generally not enjoyed to the same degree the explicit legislative sanction conferred on unions and agricultural cooperatives, yet no rational antitrust or trade regulation policy can ignore the positive competitive function or significance of such organizations.

As a result of quiet but steady growth, cooperatives have become a significant force in agriculture and other fields. For example, benefiting from the favorable climate in which they operate, producer cooperatives have grown to the point where in fiscal 1961-62 they sold farm products with a value of almost ten billion dollars. In the same period, farmer cooperatives made purchases for their members of approximately two and a half billion dollars. 3/

Retailer-owned wholesalers and other "Business Men's Cooperatives" have memberships including more than 30,000 grocery stores 4/ and 80,000 druggists. 5/ Unfortunately, the statistical data in the field leaves a great deal to be desired and it is difficult to secure accurate sales figures for these associations, but the Commission's 1960 study on food marketing shows that retailer-owned cooperatives embracing approximately 33,000 member stores had some two billion dollars annual sales in 1958. 6/

The Legislative Exemption from the Antitrust Laws

Congress has expended considerable legislative effort to ensure that the environment in which cooperatives do business will be auspicious. Excluding unions the most comprehensive legislation exempting cooperatives from the antitrust laws seems to have been enacted with respect to agricultural organizations. Although the Sherman Act 7/

contains no provision specifically exempting either agricultural cooperatives or unions from its scope, both labor and agricultural organizations sought antitrust exemptions at the time of its passage. 8/ Whatever the intention of Congress in enacting the Sherman Act, it is clear that following passage of the statute farm groups were apprehensive that marketing cooperatives would be viewed as combinations in restraint of trade. The Sherman Act was specifically directed to all combinations in restrain of trade and a combination of individual farmers or laborers might well have been considered within the scope of the statute. Unfavorable decisions in the state courts sustaining antitrust charges against cooperatives and labor unions did nothing to allay such fears. 9/

The trend toward blanket anti-trust coverage of labor culminated in Loewe v. Lawlor, 208 U.S. 274 (1908), the "Danbury Hatters" case, which applied the Sherman Act to union activities. 10/ In that case the union inspired a nationwide boycott of the plaintiff's non-union-made hats which resulted in a substantial loss of business. The Supreme Court held the Sherman Act violated, since the boycott restrained interstate commerce in the plaintiff's hats as it was intended to do. In direct response to that decision and considerable pressure from labor 11/

and farm organizations, Congress enacted a series of statutory provisions specifically encouraging the growth of labor unions and agricultural cooperatives. 12/

In addition, Congress passed a number of statutes designed to provide cooperatives exemption from the operation of the antitrust laws. The exemption conferred by these statutes, however, is not categorical and both the text of the statutes and the legislative history is to some degree ambiguous as to the extent of the immunity bestowed on the cooperative movement. The first step to provide antitrust immunity for cooperatives was taken in 1914 with the enactment of Section 6 of the Clayton Act. 13/ This legislation provides essentially that human labor is not a commodity or article in commerce, that the antitrust laws are not to be construed as forbidding the operation of non-stock labor or agricultural organizations instituted for mutual help, and that such organizations should not be held as illegal combinations or conspiracies under the antitrust laws. However, the exemption was qualified with the proviso that it would apply only in those cases where the members of the cooperative or union "lawfully" carried out the "legitimate objects" of such organizations.

Congress was not unanimous on the scope of the exemption granted by the Act 14/ which was not defined

with precision by this statute and it was generally believed that the statute did not completely and effectively assure farmers of the right to form marketing cooperatives. 15/ Farm groups as a result brought considerable pressure on Congress to clarify the situation with further legislative enactment. As a result the Capper-Volstead Act was passed in 1922. 16/ The statute provides, in pertinent part, that agricultural producers may act jointly in corporate or non-corporate associations with or without capital stock for the purpose of processing, preparing for the market and marketing the products of the members. Marketing agencies and related contracts and agreements are permissible, provided the associations are operated for the mutual benefit of the members and certain voting and other requirements are met. This legislation further stipulates that if the Secretary of Agriculture has reason to believe that an association is monopolizing or restraining trade to such an extent that the price is unduly enhanced, he may direct a cease and desist order to such practices. If an association fails to comply with such an order, responsibility for enforcement passes over to the Department of Justice.

Although the Capper-Volstead Act reaffirmed the right of farmers to associate, it embraces only those cooperatives engaged in marketing agricultural products, and, like the analogous Fishermen's Marketing Act 17/ failed to

explicitly define the extent of the exemption granted to the cooperatives. Like the text of the statute, the legislative history of the Capper-Volstead Act is somewhat ambiguous in defining Congress' intent on the scope of the antitrust immunity granted. The divergent views expressed prior to passage of these laws could be cited either in support of a conclusion that an almost complete exemption was intended or, on the other hand, in support of the inference that the exemption was limited and narrowly drawn. 18/ On the whole, the three leading Supreme Court decisions on this issue seem to have settled the question with a holding that the immunity conferred by these acts is limited rather than broad.

At the outset, it should be stated that immunity under the Capper-Volstead or Fisheries Marketing Act may be claimed only if the cooperative is in full compliance with the legislative requirements such as membership, voting rights, etc. 19/ Assuming these prerequisites have been met, the extent of the exemption still requires definition.

The Supreme Court first took up the question in United States v. Borden Co., 308 U.S. 188 (1939), where it promulgated what may be described as the "Other Persons" rule holding that Capper-Volstead does not authorize combinations or conspiracies which restrain trade in contravention of Section 1 of the Sherman Act with persons outside the producer cooperative. 20/ The decision is

notable since it terminated with finality the belief that Capper-Volstead cooperatives enjoyed absolute immunity from antitrust prosecution. The decision is also significant for determining that under Section 2 of the Capper-Volstead Act the Secretary of Agriculture merely has auxiliary and not primary jurisdiction over practices of this nature contrary to the decision of the district court below. 21/

The "Other Persons" rule has been followed by the lower courts and is useful in delineating the scope of the Capper-Volstead exemption, but it identifies only one of the limits of the permissible activities open to cooperatives under the Act. Other decisions were necessary to determine the full extent of the immunity. The second important Supreme Court decision to give further definition to the statutory antitrust immunity conferred on agricultural cooperatives is Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960). In that case the defendant cooperative comprised of dairy farmers had contracted to purchase the area's largest milk distributor, Embassy Dairy. The defendant, which was not involved in either milk distribution or processing, controlled 80 - 85% of the area's milk supply while Embassy's share of milk distribution in the market was 10%. The defendant cooperative was charged with monopolization and attempted monopolization in violation

of Section 3 of the Sherman Act and violating Section 7 of the Clayton Act 22/ by the purchase of Embassy's assets. The complaint further alleged that the association had engaged in a wide variety of predatory and coercive activities. In answer the defendant asserted it had complete antitrust immunity against these charges under Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act.

The Court rejected the defense, holding that Sections 2 and 3 of the Sherman Act overlapped and that its reasoning in Borden that the defense was not absolute under Section 1 applies with equal force to Sections 2 and 3. Significantly, the Court in construing Section 6 of the Clayton Act and the Capper-Volstead Act stressed that both statutes had been enacted to enable cooperatives to carry out the "legitimate objects" of farm organization, viz., to market their products collectively through joint marketing agencies but held further in this connection that it was not:

> ". . . [the] congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own business in their own legitimate way . . . ". 23/

In short, the Court in this proceeding articulated what may be characterized as the "Legitimate Objects" test limiting the immunity to those activities which the

statutory exemptions were designed to protect. It should be noted, however, that the Court did not rule and it had no occasion for ruling that a cooperative could not obtain complete monopoly power in the economic sense as long as it does so solely through those steps involving cooperative purchasing and selling unaccompanied by predatory practices or bad faith use of otherwise legitimate devices. 24/

In the case of the Section 7 charge the district court rejected the contention that the acquisitions were beyond the scope of the merger statute by virtue of the Capper-Volstead proviso empowering a cooperative to make the contracts and agreements necessary to effectuate the association's purpose, holding that repeal of one statute by another by implication is not favored. 25/ Judge Holtzoff further stated he had no doubt the cooperative was subject to the jurisdiction of the Federal Trade Commission and consequently within the terms of Section 7, as amended. The Supreme Court affirmed, holding that under Section 7, contrary to the association's position, the Secretary of Agriculture had no statutory authority to approve an acquisition as a "marketing agreement". It is further interesting to note that the Section 3 Sherman Act and Section 7 Clayton Act charges were considered on the same evidence. A crucial element on the charge of concerted action was the purchase contract

containing provisions by the sellers agreeing to refrain from competing in the area for a number of years and to persuade their former suppliers to either join the association or to avoid the Washington market. The application of the "Legitimate Objects" doctrine by the Supreme Court to the Section 3 charge holding the purchasing contract "as a weapon to restrain and suppress" competition seems equally applicable to the Section 7 count.

The Maryland and Virginia decision has been described as standing for the proposition that acquisition agreements involving non-Capper-Volstead firms are necessarily outside of the scope of the immunity provided by the statute. 26/ I am not fully persuaded the decision went that far. 27/ It may be argued that the Supreme Court has implicitly applied the "Other Persons" rule to the Section 7 charge, but in fact it seems plain that in their disposition of the claim for immunity with respect to the acquisition both the trial court and the Supreme Court were influenced by the fact that the proposed merger was inextricably involved in a course of action not calculated to further the legitimate objects of a cooperative. In short, I am not sure that Maryland and Virginia necessarily stands for the proposition that the acquisition by a cooperative of a non-Capper-Volstead corporation will never come within the scope of the exemption. The Supreme Court, it should be

noted, in this connection stated somewhat enigmatically that the purchase of the assets of a non-Capper-Volstead corporation simply for business use without more, often would be permitted and "would be lawful under Capper-Volstead". It seems to me that the acquisition of the assets of a non-Capper-Volstead corporation by a qualified cooperative might well be sheltered by the exemption, provided that under the facts of the particular case such acquisitions could be brought within the language of the Capper-Volstead proviso immunizing contracts and agreements necessary for the processing, handling and marketing of members' products. At any rate, I agree with the observation that on the basis of the Maryland and Virginia decision it seems that the intent behind the acquisition may be a more significant factor for evaluating the mergers undertaken by a cooperative than in the case of an ordinary business corporation. 28/

The Borden and Maryland and Virginia cases settled that the exemption is not applicable to combinations with non-Capper-Volstead cooperatives or to activities not designed to further the legitimate objects of cooperatives. Some question still remains as to the applicability of the exemption when the activities of competing Capper-Volstead cooperatives are in issue. In this connection it is interesting to note that Judge Holtzoff, who subsequently presided over the trial of Maryland and Virginia in a preceding case, held that the exemption obtained where

two competing Capper-Volstead milk-producer cooperatives were charged with engaging in a conspiracy to fix prices for milk sold to distributors. United States v. Maryland Cooperative Milk Producers, 145 F. Supp. 151 (D.D.C. 1956). It is difficult, however, to reconcile this case with the "Legitimate Objects" test spelled out by the Supreme Court in Maryland and Virginia which condemned combinations of competitors to suppress independent producers, processors or dealers, even though in that case the other party to the combination did not come within the scope of the Capper-Volstead exemption. In effect, the Maryland Cooperative Milk Producers case has been overruled, 29/ and it is safe to say that should two competing Capper-Volstead cooperatives indulge in a combination or conspiracy for predatory purposes or with the intent of fixing prices, it is doubtful that such activities would in the future be held as coming within the scope of the immunity conferred by Capper-Volstead.

There has been considerable speculation as to the application of the intra-enterprise conspiracy theory to federations of cooperative associations. Federated marketing agencies formed from a federation of agricultural or fishing cooperatives were not specifically authorized by the law but it was generally assumed that such federations were exempt. 30/ The question has now been ruled on by the Supreme Court. Farmer cooperatives are not subject to the same antitrust restrictions on the intra-enterprise

conspiracy theory as are ordinary business corporations and their subsidiaries. Reversing the Ninth Circuit, 31/ a unanimous Supreme Court in Sunkist Growers, Inc., et al. v. Winckler & Smith Citrus Products Company, 370 U.S. 19 (1962), 32/ held the antitrust laws inapplicable to agreements between a citrus grower's cooperative, its subsidiary non-profit stock corporation and another stock company owned by local associations that are members of the parent cooperative. The Court held that Section 6 of the Clayton and the Capper-Volstead Acts allowed a cooperative to form a single entity to handle collectively all the processing and marketing of citrus fruits. 33/ Ruling that the statutory exemption applied, the Court treated the three separate legal entities as a single cooperative organization, stating:

> ". . . To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts . . . ." 34/

The Court noted that there was no indication that the use of separate corporations had any economic significance or that outsiders dealt with the three entities as independent organizations. It is significant that the Court concluded its opinion by stating the decision should not be taken in any way as detracting from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups and for monopolization. 35/

Considered together, the three leading Supreme Court decisions on the subject lead to the following conclusions: in the case of combinations between a qualified Capper-Volstead cooperative with a non-qualified person or firm the exemptions do not apply and the cooperative's activities with other persons are subject to the same antitrust prohibitions as those of any other business entity. Where the cooperative has a legitimate business relationship with other qualified cooperatives or with its own members or subsidiaries, the exemption from antitrust will be allowed provided that the particular activity is within the legitimate object of the cooperative's function involving no predatory activities. Moreover, on the basis of the Maryland and Virginia and Borden cases, it is a fair assumption that combinations of non-federated cooperatives and conspiracies between qualified cooperatives are outside the scope of the exemption. Where the relationships of qualified cooperatives with each other are in issue, the courts will apply the "Legitimate Objects" test, proceeding on a case-by-case basis to examine the methods and intent of these associations. This interpretation harmonizes Borden, Maryland and Virginia, and Sunkist. Sunkist, of course, went no further than holding that a combination of related cooperatives was not in and of itself unlawful. Although the case gives some sanction

to joint marketing activities by federated cooperatives, predatory practices, in my view, would immediately remove the exemption from the cooperative associations, whatever their relationship.

Commission Proceedings Under The Federal Trade Commission and Robinson-Patman Acts

The Commission has had occasion to rule on the practices of cooperatives under its organic statute, the Federal Trade Commission Act, 36/ in a number of instances. I will touch upon three of these proceedings, selected not so much because of their legal significance but because they illustrate the diversity and range of problems facing this agency when a farmer's or business cooperative is brought within the regulatory net. The first case I would like to discuss is that of Atlas Supply Co., et al., 48 F.T.C. 53 (1951). In that case the Commission charged the Atlas Supply Company, a subsidiary of the Standard Oil Companies of Kentucky, Ohio, California, Indiana and New Jersey, with violating Sections 2(c) 37/ and (f) 38/ of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. 39/ The Standard companies had joined together to cooperatively purchase their requirements of tires, batteries and accessories through Atlas, a subsidiary whose stock they owned in equal part and whose net earnings were paid as dividends on a patronage basis to the stockholders. In effect, these major oil companies, which had been divorced by the

dissolution of the Standard Oil trust in 1911, had organized their own buying cooperative. The Commission adopted the initial decision of the hearing examiner, finding violations on all three counts. I shall pass over quickly the Clayton Act counts and merely note that under Section 5 the Commission found that respondents had agreed and combined among themselves to utilize the influence of their combined purchasing power in order to purchase TBA products at illegally discriminatory prices and to obtain other preferential treatment from suppliers not available to their competitors. Among other prohibitions, the order enjoined the respondents from the conspiratorial use of their combined purchasing power to obtain preferential prices. The Commission, it may be noted, in this instance found that as a result of the challenged practices respondents increased their market control in the purchase of and resale of TBA products from a negligible share to approximately 10%.

The case is of interest primarily because of the size of the companies involved; usually, of course, when we think of businessmen's cooperatives we think in terms of small business banding together to equalize their bargaining power with other segments of the economy with which they would otherwise be at a disadvantage. Obviously, that concept does not fit the Atlas case. The case is of further interest because of the Section 5 attack upon

collective and cooperative use of bargaining power to secure preferential prices. To my knowledge it has been the Commission's policy to proceed under the Robinson-Patman Act in its succeeding buying group cases. It is interesting to speculate, in view of the barriers set up by Automatic Canteen 40/ to prosecution under Section 2(f) whether Section 5 charges, in light of the precedent of Atlas, would not have been a more effective medium of law enforcement in this area.

Proceedings against agricultural cooperatives involve, on occasion, difficult questions as to the proper scope of the remedy when the Commission action also to some extent impinges on areas subject to regulation by the Department of Agriculture. A recent and conspicuous example of a problem of this nature is Central Arkansas Milk Producers Association, Inc., et al., Docket No. 8391 (1964). In that case the cooperative, composed of approximately 1,500 dairy farmers located in the states of Arkansas, Louisiana, Oklahoma and Missouri, was charged with violating Section 5 of the Federal Trade Commission Act by conspiring and utilizing coercive tactics to ensure that the association would supply all the raw milk requirements of certain processors at premium prices established by respondents in excess of the minimum prices established as reasonable by the U. S. Department of Agriculture under Federal milk marketing orders. Count II of the complaint alleged that

the respondent association discriminated in price between purchasers of raw milk in competition with each other, in violation of Section 2(a) of the Robinson-Patman Act. Under Count I the examiner found the record established that respondent by threats and coercion had induced certain milk handlers to purchase all their requirements from the cooperative and that these were unfair trade practices within the scope of the complaint. In addition, he sustained the price discrimination charge. On appeal the provisions in the order relating to the Section 5 charges did not present problems of consequence. Under the price discrimination count, however, the examiner had issued a broad order flatly prohibiting price discriminations without reference to the fact that the respondent cooperative was operating under several milk marketing orders to which it had to conform its pricing. The stage was set for a collision between the Commission and the Department of Agriculture, the Commission acting under the aegis of the Robinson-Patman Act and Agriculture under the Agricultural Marketing Agreement Act of 1937. 41/ The Department of Agriculture, joining with respondents in appealing the initial decision, objected that the examiner's proposed order would require absolute identity in the price of milk of the same grade and quality delivered to all purchasers and for all uses, disregarding that the association's milk was subject to several marketing orders. Agriculture contended that the

order's requirement for price uniformity conflicted with the Agricultural Marketing Agreement Act and the marketing orders thereunder to which the cooperative's milk was subject. Fortunately, at the oral argument it became apparent that counsel were amenable to negotiations to obviate these problems and the Commission subsequently adopted a consent order in effect providing that price differentials permitted or required by milk marketing orders were not to come within the scope of the order's prohibitions. In short, this case presents an interesting example of the problems facing the agencies in charge of implementing antitrust when agricultural cooperatives, to a very real degree, are beyond their reach as a practical matter because of specific regulatory authority conferred on the Secretary of Agriculture by such laws as the Agricultural Marketing Agreement Act in addition to the statutory exemptions such as the Capper-Volstead Act.

Certainly no discussion of cooperatives of businessmen or distributing cooperatives would be complete without reference to the Federal Trade Commission's advisory opinion on proposed joint advertising by groups of retail druggists and the furor occasioned thereby. It will be recalled that on October 24, 1962, representatives of groups of retail druggists requested an advisory opinion from the Commission concerning the legality of cooperative advertising schemes to be undertaken by groups of retail druggists. In this connection the Commission advised:

> "To the extent that any aspect of the plan would involve a common understanding, agreement, or approval by members of the group, express or implied, of any price, term, or condition of sale of any item advertised by the group, the plan would contravene laws entrusted to the Commission for enforcement. In this connection, it is the Commission's opinion that the group publication of an advertisement containing any selling price raises a serious question whether the members of the group have agreed to and will sell at those prices. . . ." 42/

The majority of the Commission noted that it was in no position to give its approval to any plan containing such a basic flaw. Prior to the issuance of the Commission's advisory opinion on January 15, 1963, the Commission had been advised that on the basis of the same information the Antitrust Division of the Department of Justice had taken the position that the granting of clearance on this matter would be inconsistent with the antitrust laws.

The Commission's opinion subsequently became public and drew immediate Congressional attention. Quickly Senator Hubert Humphrey (D. Minn.) introduced S. 1320, a bill to exempt joint cooperative advertising of prices by small business groups, 43/ and the Select Committee on Small Business of the House of Representatives held hearings on this problem on May 3, 1963, at which representatives of the Federal Trade Commission and the Antitrust Division of the Department of Justice testified. 44/ Thereafter, the Committee issued a report 45/ in which it concluded that the hearings had cleared the air in making it plain that neither the Department of Justice nor the Federal

Trade Commission would institute proceedings against small retailers simply for publishing cooperative ads containing prices. Moreover, the report gave a broad hint that action by the enforcement agencies against this type of group activity by small retailers would not be in the public interest.

For my part, it is still my view that the Commission could not properly have given blanket approval to the practices defined in the request for the advisory opinion even though, as a general matter, the Commission itself does not intend to proceed against activities of this nature by retailers in the small business category. Our advice was sought as to the legality of this practice and clearly it would be impossible to predict with finality for all time the actions of the antitrust enforcement agencies in what is a borderline area presenting complex economic and legal questions. On the other hand, it is safe to say that in the absence of unusual circumstances the Commission, at any rate, is unlikely to devote its limited funds and manpower to questions of this nature since there are other practices of greater public interest and economic significance demanding our attention. The lesson to be drawn from our experience on the Advisory Opinion on Joint Advertising seems to be simply this: that the legislative and public concern with equalizing the economic power of small business

through cooperative action is still very strong, and one that the enforcement agencies cannot ignore if they wish to continue receiving public support.

As indicated previously, the business cooperatives with which the Commission deals, in contrast to the farmer cooperatives, are a variegated and non-homogenous group. Nor do the businessmen's co-ops enjoy the specific statutory definition conferred on farmer co-ops by Congress. Section 4 of the Robinson-Patman Act, 46/ the legislative statement encouraging cooperatives in this area, provides that nothing in the Act is to be construed as preventing a cooperative from returning the whole or part of its net earnings or surplus to its members, producers or consumers in proportion to their purchases or sales from, to or through the organization. This section, however, has not been meaningful in defining the activities permissible for businessmen's cooperatives, for it throws no light on the threshold question as to precisely the activities in which such an association may engage to earn the surplusses or profits which it has a statutory authority to distribute. Clearly, businessmen's cooperatives do not have exemption from the antitrust laws generally or the Robinson-Patman Act specifically. Nevertheless, the question remains what standards should be applied to these groups in determining whether a violation of law has been committed. In addressing myself to this problem I must

necessarily, because of limitations of time and space, and the fact that several cases are still pending in this area limit myself largely to a general outline of the problems confronting the Commission in the buying group cases.

Recently, most of the Commission's activity relating to buying groups under the Robinson-Patman Act has taken place in the automotive parts industry. The first cases instituted in this area involved the practice of granting favorable prices to cooperative buying groups of jobbers who consolidated their orders to qualify for larger discounts under a supplier's discount pricing schedule. These were typically a rebate payable on total purchases by a buyer during a previous base period, or, in other words, a cumulative quantity discount. In the earlier cases the cooperatives performed no services and they were in reality no more than a bookkeeping device for the collection of rebates or discounts received from sellers on the purchases of the association's jobber members. On this set of facts the courts had no difficulty in finding that the suppliers had violated Section 2(a) of the Robinson-Patman Act. 47/

The problems became more complex as the automotive jobber buying groups changed their method of operation from bookkeeping devices to one where they took upon themselves certain of the distributional functions formerly served by suppliers or by other distributors. At this point more

difficult problems of policy came into play. Certain groups began to acquire warehousing facilities, ordering the parts from suppliers, taking receipt of the parts and effecting distribution to the jobber members. Orders by the groups' members direct to the suppliers and shipments by suppliers directly to the jobbers were substantially eliminated. Cumulative quantity discounts condemned by former proceedings were replaced by purported functional discounts characterized as "redistribution" or "warehouse distributors" discounts.

As the groups have taken on more distributive functions the Commission is increasingly faced with the problem of determining the identity of the purchaser in the particular case for the purposes of that proceeding. If on the facts of a specific case it is determined that the group rather than its members is the purchasing entity, then the Commission will have to face the issue of whether or not there is in fact an actionable discrimination since the buying group and the warehouse distributors in the automotive parts field apparently have generally received the same redistribution discounts. In the past it had generally been the Commission's theory that the co-op's members were the actual purchasers and that irrespective of the function performed the discriminatory price had an adverse impact on the non-favored customers competing

with the group's members. As we get more experience in the light of new developments, we will be better able to decide whether some of our concepts in the area require rethinking or reorientation.

Turning to Section 2(c), the most significant recent case dealing with the relationship of a cooperative purchasing association to that section of the Robinson-Patman Act, is Central Retailer Owned Grocers, Inc., et al. v. Federal Trade Commission, 319 F.2d 410 (7th Cir. 1963). That case to a considerable extent focuses on the same policy problem. In that case the Commission found thirty-five retailer-owned grocery wholesalers had utilized a cooperative buying organization as an agent to secure private label goods for the members. It held further that when Central demanded and received lower prices on the basis of its "unique way of doing business", the cooperative required compensation for services it performed for its members and thus was receiving payments in lieu of brokerage. 48/ The Seventh Circuit reversed, overturning the Commission's finding that Central was the buying agent of its members, finding instead that Central was not a broker since it purchased on its own account, was billed by the sellers and reimbursed the suppliers. In short, the court held Section 2(c) inapplicable. Further, the court found that Central

was able to secure favorable prices because of the functions which it performed for the suppliers, first giving them an assured volume of business, reducing the credit risk, cutting down on billing work, as well as Central's advance commitments for later requirements. The court reasoned that as a result the suppliers knew that in selling to Central they were realizing savings in their business operations, enabling the group's members in turn to benefit when they purchased from the buying group.

I cannot help feeling that the court's decision turned largely on the fact that it felt that Central represented "a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer" and that this made these independent grocers stronger in competition with the large chain stores. It seems to me at any rate that as far as the court was concerned the decision to reverse the Commission's finding that Central was an intermediary of its members resulted in large part from its feeling that Central was performing a valuable competitive function enabling independent merchants to survive.

In short, the buying group cases pose the question of the extent to which the Commission in enforcing the Robinson-Patman Act should encourage the formation of

buying groups for the purpose of strengthening small businessmen's buying power through joint action as opposed to the protection of the small unorganized merchant who may be at a disadvantage with his more organization-minded brethren. The classic judicial delineation of this dilemna was given by the Fifth Circuit in a decision affirming the Commission's cease and desist order against an automotive parts buying group when it stated:

> "If this is to entrench further the large chain store automobile gasoline dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off this huge and overpowering rival, injure even unwittingly a smaller one. . . ." 49/

Conclusion

The more recent developments do not lend themselves to easy generalizations on the manner in which the Commission or the other enforcement agencies can best harmonize the antitrust laws and the cooperative movement in order to enable the smaller units of the economy to compete more effectively. One conclusion seems warranted, however. With some exceptions, the concurrent development of the antitrust laws and of the cooperative movement has been marked by a concomitant trend toward relaxation of antitrust strictures as far as cooperatives are concerned,

either by way of specific legislative exemption or more informally on a case-to-case basis by the standards set for determining the public interest in proceeding with a particular case or by requiring a more rigid standard of proof to establish a violation of law. With the exception of hard core violations involving predatory practices, in the case of small business or farmers' cooperatives, it may be expected that the Commission will increasingly look at the economic and competitive function of the particular cooperative and where permissible, will apply the rule of reason. This, I believe, is a healthy development but if it is to have a continuing beneficial effect, the antitrust enforcement agencies and the courts must, in reality, take a searching look at the individual cooperative. For example, a business co-op may range from a buying group of independent retail druggists to an association of leading department stores or even, at the extreme end of the spectrum, a group of major oil companies banded together to enjoy more favorable purchasing. The competitive impact of each varies and a judicious antitrust enforcement policy requires recognition of that difference in the particular case.

FOOTNOTES

1/ Galbraith, American Capitalism, The Concept of Countervailing Power, Houghton Mifflin Company (1952), p. 145; see also Justice Frankfurter's opinion in Tigner v. Texas, 310 U.S. 141, 145 (1940).

2/ U.S. News & World Report, June 22, 1964, p. 22.

3/

Kind of Co-Op	Number of Co-ops	Members (000)	Annual Business (000)
Credit unions	20,902	12,839	$ 606,903 savings 384,727 loans
Cooperatively-oriented insurance companies	9	11,000	321,716
Group health plans	178	4,552	259,300
Farm supply co-ops	3,297	3,600	2,408,157
Farm marketing co-ops	5,828	3,622	9,293,932
Rural electric co-ops	986	4,422	568,718
Rural telephone co-ops	3,630	500	24,000
Federal land banks	763	380	2,782,000 *
Production credit associations	487	535	2,300,000
Major co-op consumer goods centers	46	154	94,065
Housing co-ops	497	121	129,000
Student co-ops	500	50	11,000
Memorial associations	100	100	750

SOURCE: The Cooperative League of the USA, Cooperatives USA, 1961-62.

* These figures, which are subsequent to the other data in the chart, are taken from the Annual Report, Farm Credit System (1962-1963) and were obtained from Mr. David Angevin, Cooperative League, Washington, D. C.

4/ Staff Report to the Federal Trade Commission, Economic Inquiry into Food Marketing, Part I (1960), p. 159.

5/ Cooperative League of the USA, Cooperatives 1959-60 58 (1960).

6/ Economic Inquiry into Food Marketing, supra n. 4, pp. 160-61.

7/ 26 Stat. 209 (1890), 15 U.S.C. § 1, 2 & 3 (1958).

8/ Noakes, Exemption for Cooperatives, 19 A.B.A. Antitrust Section, 407, 410 (1961).

9/ See e.g., Burns v. Wray Farmers' Grain Co., 176 P. 487 (Colo. 1918); Ford, et al. v. Chicago Milk Shippers Ass'n, 39 N.E. 651 (Ill. 1895); Georgia Fruit Exchange v. Turnipseed, 62 So. 542 (Ala. 1913); Reeves v. Decorah Farmers' Cooperative Society, et al., 140 N.W. 844 (Iowa 1913); Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 184-189 (1948).

10/ ". . . The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." Loewe v. Lawlor, 208 U.S. 274, 301 (1908).

11/ Cf., Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 294-295 (1955). For a discussion of the considerations involving labor unions influencing enactment of the statute, see Kovner, The Legislative History of Section 6 of the Clayton Act, 47 Col. L. Rev. 749 (1947).

12/ In addition to statutes purporting to define agricultural cooperatives' exemption from the antitrust laws, Congress enacted a number of statutes designed to improve the economic climate in which they operate and to encourage their formation and growth. E.g.:

Congress provided for a system of Federal Intermediate Credit Banks to help farmers solve their credit needs. These banks were authorized to make loans to cooperatives on staple agricultural products and livestock. (42 Stat. 1454 (1923), 12 U.S.C.A. 1021.)

In 1926 an act was passed to create a Division of Cooperative Marketing in the Bureau of Agricultural Economics (44 Stat. 802, 7 U.S.C.A. 451). The purposes of this act were described by its title which read as follows:

> "An Act To create a division of cooperative marketing in the Department of Agriculture; to provide for the acquisition and dissemination of information pertaining to cooperation; to promote the knowledge of cooperative principles and practices; to provide for calling advisers to counsel with the Secretary of Agriculture on cooperative activities; to authorize cooperative associations to acquire, interpret, and disseminate crop and market information, and for other purposes."

The Farm Credit Act of 1933 (48 Stat. 257, 261, 12 U.S.C.A. 1134) authorized the organization of 12 regional banks for cooperatives and the Central Bank for Cooperatives, for the purpose of making loans to cooperatives.

The Agricultural Marketing Agreement Act of 1937 provides that:

> ". . . The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." (49 Stat. 767 (1935), 50 Stat. 246 (1937), 7 U.S.C. 610(b) (1) (1958).)

Similar provisions were included in the Soil Conservation and Domestic Allotment Act, enacted in 1935 as amended in 1938 (52 Stat. 31, 32, 16 U.S.C.A. 590 h (b)).

State legislatures also passed extensive legislation to further the cooperative movement. See statutes collected in Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181 (1948).

These references are merely illustrative and do not pretend to cover all legislation relating to agricultural cooperatives, much less to fishery cooperatives, labor unions and other types of cooperatives.

13/ 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

14/ Comment, 43 Neb. L. Rev. 73, 76-77 (1963).

15/ Cf., Evans and Stokdyk, The Law of Agricultural Marketing Co-operative Marketing, The Lawyer's Co-operative Publishing Company 1937, 109; Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 393 (1958).

16/ 42 Stat. 388 (1922), 7 U.S.C. § 291, 292 (1958).

17/ 48 Stat. 1213-14 (1934), 15 U.S.C. §§ 521-22 (1958).

18/ See Saunders, The Status of Agricultural Cooperatives Under the Antitrust Laws, 20 Fed. B.J. 35, 36-40 (1960).

19/ See Maryland & Virginia Milk Producers Ass'n v. United States, 167 F. Supp. 45, 50 (D.D.C. 1958), where the trial judge held a cooperative can qualify under Capper-Volstead if it does not deal in products of non-members to an amount greater in value than that handled for members and, if it either requires one member one vote, or does not pay its members in excess of an 8 percent annual dividend.

20/ The practice the Court found illegal in that instance was a conspiracy between a Capper-Volstead cooperative, Chicago milk distributors, labor unions and others for the purpose of fixing prices and to control the milk supply in the area.

21/ 28 F. Supp. 177, 183 (N.D. Ill. 1939), rev'd, 308 U.S. 188 (1939).

22/ 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

23/ 362 U.S. 458, 467 (1960).

24/ Cf., Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900, 907 (D. Mass. 1954).

25/ 167 F. Supp., supra n. 19, at 53.

26/ E.g., Stark, Capper-Volstead Revisited, American Cooperation, American Institute of Cooperation (1960) 453, 464; Comment, 43 Neb. L. Rev. 73, 95 (1963); cf., Saunders, supra n. 18, at 53.

27/ The district court decision, 167 F. Supp., supra n. 19, at 52, 53, insofar as it applied the Borden "Other Persons" rule, in my opinion largely confined that rule to the Sherman Act charges. On review the Supreme Court did not explicitly apply the Borden rule to the merger situation.

28/ Stark, Capper-Volstead Revisited, supra n. 26, at 464.

29/ See note, 36 Ind. L.J. 497, 506 (1961). .

30/ ". . . Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act through centralized marketing agencies in disposing of the products of their members, and that they should, in representation of their members, hold stock in such centralized marketing agencies; I can not doubt, in view of the purposes of the Capper-Volstead Act, that such methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute". 36 Ops. Att'y Gen. 326, 339-40 (1930); see also, Cooperative Marketing Act, 44 Stat. 802 (1926), 7 U.S.C. § 453(a) (1958).

See also, Noakes, supra n. 8, at 418; Mischler, Agricultural Cooperative Law, supra n. 15, at 394; Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 308 (1955); Jensen, "The Bill of Rights of U.S. Cooperative Agriculture", supra n. 9, at 190.

31/ Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960), rev'd, 370 U.S. 19 (1962).

32/ This case involved a treble damage action by a processor of by-product oranges against Sunkist Growers, Inc., the parent cooperative which processed and marketed citrus fruits for 12,000 growers in Arizona and California. "[T]he individual growers involved each belong to a local grower association. Fruit which is to be sold fresh is packed by the

associations and marketed by Sunkist, a non-stock membership corporation comprised of district exchanges to which the associations belong. Most fruit which is to be processed into by-products is handled by Exchange Orange, a subsidiary of Sunkist, or by Exchange Lemon, a separate organization comprised of a number of Sunkist member associations. It is then marketed by the products department of Sunkist which is managed by directors of Exchange Orange and Exchange Lemon." 370 U.S. 19, 22 (1962). The complaint charged that the defendants conspired to combine and monopolize trade. The Supreme Court granted certiorari limited to the issue of immunity of the inter-organization dealings among the three cooperatives from the conspiracy provisions of the antitrust laws.

33/ ". . . The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. . . ." 370 U.S. 19, 28 (1962).

34/ Id. at 29.

35/ Id. at 30.

36/ 38 Stat. 717 (1914), as amended, 15 U.S.C. Sec. 41 et seq. (1958).

37/ 49 Stat. 1526, 1527 (1936), 15 U.S.C. Sec. 13(c) (1958).

38/ 49 Stat. 1526, 1527 (1936), 15 U.S.C. Sec. 13(f) (1958).

39/ 38 Stat. 719 (1914), as amended, 15 U.S.C. Sec. 45 (1958).

40/ Automatic Canteen Company of America v. Federal Trade Commission, 346 U.S. 61 (1953).

41/ 48 Stat. 31 (1933), as amended, 50 Stat. 246 (1937), 7 U.S.C. 601 et seq. (1958).

42/ Trade Reg. Rep. Paragraph 50,183.

43/ To date there have been no hearings or other actions on this bill.

44/ Hearing Before the Select Committee on Small Business, House of Representatives, on FTC Advisory Opinion on Joint Ads, 88th Cong., 1st Sess. (1963).

45/ H.R. Rep. No. 699, 88th Cong., 1st Sess. (1963).

46/ 49 Stat. 1528 (1936), 15 U.S.C. § 13(b) (1958).

47/ For example, the court in Standard Motor Products, Inc. v. Federal Trade Commission, 265 F.2d 674, 676 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959), condemned the practice, stating:

> ". . . the buying groups brought into being by the widespread use of these discounts make no improvement in the efficiency or real cost of distributing auto parts to the public, but, as is clear from the testimony of Standard's own witnesses, function entirely through their aggregate buying power.

48/ The Commission, in finding that the group was the agent of the buyers and not the purchaser in these transactions relied on the Articles of Incorporation, stating it was Central's function to provide a purchasing organization for the members, and to effect savings through bulk purchasing to be distributed to the members on a percentage basis. The Commission further based this finding on the fact that Central resold to no one except its members, its negotiations with suppliers were based on the members' advance estimates and that it could not as a practical matter make purchases except for its members since it did not warehouse the merchandise. The Commission found, on the basis of the foregoing, that Central's purchases were geared solely to the needs of its members, concluding therefore that a finding that the cooperative was acting in an independent capacity would be inconsistent with the facts of the record. Commission opinion, Docket 7121, pp. 5-6.

49/ Mid-South Distributors, et al. and Cotton States, Inc., et al. v. Federal Trade Commission, 287 F.2d 512, 520 (5th Cir. 1961), cert. denied, 368 U.S. 838 (1961).

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C O O P E R A T I V E S

Statement by

EVERETTE MACINTYRE

Member of the Federal Trade Commission

Before the

ANTITRUST SECTION OF THE

AMERICAN BAR ASSOCIATION

New York, N.Y.

August 11, 1964

C O O P E R A T I V E S

Introduction

The role of the cooperative must be considered in the light of two aspects of our national policy which have contributed greatly to our economic achievements. One of these is the antitrust laws, dedicated to the maintenance of free competition; the other legislation and public policy encouraging cooperation among producers and the development of cooperative associations. Since the two principles are at once concurrent and at times seemingly in conflict, it is inevitable that questions should arise about the compatibility of cooperatives and the antitrust laws.

The reasons for our public policy encouraging the growth of the cooperative movement is clear. It stems fundamentally from a desire to equalize the bargaining power of the individuals belonging to the cooperatives and the larger firms with which they find it necessary to do business. In the case of agriculture and labor, at any rate, Congress by various statutes exempting agricultural

cooperatives and union activities from the antitrust laws has implicitly recognized that efforts on the part of these sectors of the economy to develop market power differed from that of industry, the difference being that such efforts were the response of workers and farmers to the power of those to whom they sold their labor or products. 1/ The recognition of this difference continues, there being current pressure for new legislation to encoura and assist cooperatives. The U.S. News & World Report of June 22, 1964, for example, stated that the United States Secretary of Agriculture "is reported to be convinced that farm-marketing cooperatives — organized on a national scale with Government backing — are about the only way that the farmer can gain the bargaining power he needs to protect his market prices. Plans are afoot now to put more 'muscle' into co-operatives." 2/

In addition, the antitrust enforcement agencies must take into consideration groups of small businesses banding together either to increase their purchasing power or to distribute their products more effectively. These groups have generally not enjoyed to the same degree the explicit legislative sanction conferred on unions and agricultural cooperatives, yet no rational antitrust or trade regulation policy can ignore the positive competitive function or significance of such organizations.

As a result of quiet but steady growth, cooperatives have become a significant force in agriculture and other fields. For example, benefiting from the favorable climate in which they operate, producer cooperatives have grown to the point where in fiscal 1961-62 they sold farm products with a value of almost ten billion dollars. In the same period, farmer cooperatives made purchases for their members of approximately two and a half billion dollars. 3/

Retailer-owned wholesalers and other "Business Men's Cooperatives" have memberships including more than 30,000 grocery stores 4/ and 80,000 druggists. 5/ Unfortunately, the statistical data in the field leaves a great deal to be desired and it is difficult to secure accurate sales figures for these associations, but the Commission's 1960 study on food marketing shows that retailer-owned cooperatives embracing approximately 33,000 member stores had some two billion dollars annual sales in 1958. 6/

The Legislative Exemption from the Antitrust Laws

Congress has expended considerable legislative effort to ensure that the environment in which cooperatives do business will be auspicious. Excluding unions the most comprehensive legislation exempting cooperatives from the antitrust laws seems to have been enacted with respect to agricultural organizations. Although the Sherman Act 7/

contains no provision specifically exempting either agricultural cooperatives or unions from its scope, both labor and agricultural organizations sought antitrust exemptions at the time of its passage. 8/ Whatever the intention of Congress in enacting the Sherman Act, it is clear that following passage of the statute farm groups were apprehensive that marketing cooperatives would be viewed as combinations in restraint of trade. The Sherman Act was specifically directed to all combinations in restrai of trade and a combination of individual farmers or laborers might well have been considered within the scope of the statute. Unfavorable decisions in the state courts sustaining antitrust charges against cooperatives and labor unions did nothing to allay such fears. 9/

The trend toward blanket anti-trust coverage of labor culminated in Loewe v. Lawlor, 208 U.S. 274 (1908), the "Danbury Hatters" case, which applied the Sherman Act to union activities. 10/ In that case the union inspired a nationwide boycott of the plaintiff's non-union-made hats which resulted in a substantial loss of business. The Supreme Court held the Sherman Act violated, since the boycott restrained interstate commerce in the plaintiff's hats as it was intended to do. In direct response to that decision and considerable pressure from labor 11/

and farm organizations, Congress enacted a series of statutory provisions specifically encouraging the growth of labor unions and agricultural cooperatives. 12/

In addition, Congress passed a number of statutes designed to provide cooperatives exemption from the operation of the antitrust laws. The exemption conferred by these statutes, however, is not categorical and both the text of the statutes and the legislative history is to some degree ambiguous as to the extent of the immunity bestowed on the cooperative movement. The first step to provide antitrust immunity for cooperatives was taken in 1914 with the enactment of Section 6 of the Clayton Act. 13/ This legislation provides essentially that human labor is not a commodity or article in commerce, that the antitrust laws are not to be construed as forbidding the operation of non-stock labor or agricultural organizations instituted for mutual help, and that such organizations should not be held as illegal combinations or conspiracies under the antitrust laws. However, the exemption was qualified with the proviso that it would apply only in those cases where the members of the cooperative or union "lawfully" carried out the "legitimate objects" of such organizations.

Congress was not unanimous on the scope of the exemption granted by the Act 14/ which was not defined

with precision by this statute and it was generally believed that the statute did not completely and effectively assure farmers of the right to form marketing cooperatives. 15/ Farm groups as a result brought considerable pressure on Congress to clarify the situation with further legislative enactment. As a result the Capper-Volstead Act was passed in 1922. 16/ The statute provides, in pertinent part, that agricultural producers may act jointly in corporate or non-corporate associations with or without capital stock for the purpose of processing, preparing for the market and marketing the products of the members. Marketing agencies and related contracts and agreements are permissible, provided the associations are operated for the mutual benefit of the members and certain voting and other requirements are met. This legislation further stipulates that if the Secretary of Agriculture has reason to believe that an association is monopolizing or restraining trade to such an extent that the price is unduly enhanced, he may direct a cease and desist order to such practices. If an association fails to comply with such an order, responsibility for enforcement passes over to the Department of Justice.

Although the Capper-Volstead Act reaffirmed the right of farmers to associate, it embraces only those cooperatives engaged in marketing agricultural products, and, like the analogous Fishermen's Marketing Act 17/ failed to

explicitly define the extent of the exemption granted to the cooperatives. Like the text of the statute, the legislative history of the Capper-Volstead Act is somewhat ambiguous in defining Congress' intent on the scope of the antitrust immunity granted. The divergent views expressed prior to passage of these laws could be cited either in support of a conclusion that an almost complete exemption was intended or, on the other hand, in support of the inference that the exemption was limited and narrowly drawn. 18/ On the whole, the three leading Supreme Court decisions on this issue seem to have settled the question with a holding that the immunity conferred by these acts is limited rather than broad.

At the outset, it should be stated that immunity under the Capper-Volstead or Fisheries Marketing Act may be claimed only if the cooperative is in full compliance with the legislative requirements such as membership, voting rights, etc. 19/ Assuming these prerequisites have been met, the extent of the exemption still requires definition.

The Supreme Court first took up the question in United States v. Borden Co., 308 U.S. 188 (1939), where it promulgated what may be described as the "Other Persons" rule holding that Capper-Volstead does not authorize combinations or conspiracies which restrain trade in contravention of Section 1 of the Sherman Act with persons outside the producer cooperative. 20/ The decision is

notable since it terminated with finality the belief that Capper-Volstead cooperatives enjoyed absolute immunity from antitrust prosecution. The decision is also significant for determining that under Section 2 of the Capper-Volstead Act the Secretary of Agriculture merely has auxiliary and not primary jurisdiction over practices of this nature contrary to the decision of the district court below. 21/

The "Other Persons" rule has been followed by the lower courts and is useful in delineating the scope of the Capper-Volstead exemption, but it identifies only one of the limits of the permissible activities open to cooperatives under the Act. Other decisions were necessary to determine the full extent of the immunity. The second important Supreme Court decision to give further definition to the statutory antitrust immunity conferred on agricultural cooperatives is Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960). In that case the defendant cooperative comprised of dairy farmers had contracted to purchase the area's largest milk distributor, Embassy Dairy. The defendant, which was not involved in either milk distribution or processing, controlled 80 - 85% of the area's milk supply while Embassy's share of milk distribution in the market was 10%. The defendant cooperative was charged with monopolization and attempted monopolization in violation

of Section 3 of the Sherman Act and violating Section 7 of the Clayton Act 22/ by the purchase of Embassy's assets. The complaint further alleged that the association had engaged in a wide variety of predatory and coercive activities. In answer the defendant asserted it had complete antitrust immunity against these charges under Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act.

The Court rejected the defense, holding that Sections 2 and 3 of the Sherman Act overlapped and that its reasoning in Borden that the defense was not absolute under Section 1 applies with equal force to Sections 2 and 3. Significantly, the Court in construing Section 6 of the Clayton Act and the Capper-Volstead Act stressed that both statutes had been enacted to enable cooperatives to carry out the "legitimate objects" of farm organization, viz., to market their products collectively through joint marketing agencies but held further in this connection that it was not:

> ". . . [the] congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own business in their own legitimate way . . . ". 23/

In short, the Court in this proceeding articulated what may be characterized as the "Legitimate Objects" test limiting the immunity to those activities which the

statutory exemptions were designed to protect. It should be noted, however, that the Court did not rule and it had no occasion for ruling that a cooperative could not obtain complete monopoly power in the economic sense as long as it does so solely through those steps involving cooperative purchasing and selling unaccompanied by predatory practices or bad faith use of otherwise legitimate devices. 24/

In the case of the Section 7 charge the district court rejected the contention that the acquisitions were beyond the scope of the merger statute by virtue of the Capper-Volstead proviso empowering a cooperative to make the contracts and agreements necessary to effectuate the association's purpose, holding that repeal of one statute by another by implication is not favored. 25/ Judge Holtzoff further stated he had no doubt the cooperative was subject to the jurisdiction of the Federal Trade Commission and consequently within the terms of Section 7, as amended. The Supreme Court affirmed, holding that under Section 7, contrary to the association's position, the Secretary of Agriculture had no statutory authority to approve an acquisition as a "marketing agreement". It is further interesting to note that the Section 3 Sherman Act and Section 7 Clayton Act charges were considered on the same evidence. A crucial element on the charge of concerted action was the purchase contract

containing provisions by the sellers agreeing to refrain from competing in the area for a number of years and to persuade their former suppliers to either join the association or to avoid the Washington market. The application of the "Legitimate Objects" doctrine by the Supreme Court to the Section 3 charge holding the purchasing contract "as a weapon to restrain and suppress" competition seems equally applicable to the Section 7 count.

The Maryland and Virginia decision has been described as standing for the proposition that acquisition agreements involving non-Capper-Volstead firms are necessarily outside of the scope of the immunity provided by the statute. 26/ I am not fully persuaded the decision went that far. 27/ It may be argued that the Supreme Court has implicitly applied the "Other Persons" rule to the Section 7 charge, but in fact it seems plain that in their disposition of the claim for immunity with respect to the acquisition both the trial court and the Supreme Court were influenced by the fact that the proposed merger was inextricably involved in a course of action not calculated to further the legitimate objects of a cooperative. In short, I am not sure that Maryland and Virginia necessarily stands for the proposition that the acquisition by a cooperative of a non-Capper-Volstead corporation will never come within the scope of the exemption. The Supreme Court, it should be

noted, in this connection stated somewhat enigmatically that the purchase of the assets of a non-Capper-Volstead corporation simply for business use without more, often would be permitted and "would be lawful under Capper-Volstead". It seems to me that the acquisition of the assets of a non-Capper-Volstead corporation by a qualified cooperative might well be sheltered by the exemption, provided that under the facts of the particular case such acquisitions could be brought within the language of the Capper-Volstead proviso immunizing contracts and agreements necessary for the processing, handling and marketing of members' products. At any rate, I agree with the observation that on the basis of the Maryland and Virginia decision it seems that the intent behind the acquisition may be a more significant factor for evaluating the mergers undertaken by a cooperative than in the case of an ordinary business corporation. 28/

The Borden and Maryland and Virginia cases settled that the exemption is not applicable to combinations with non-Capper-Volstead cooperatives or to activities not designed to further the legitimate objects of cooperatives. Some question still remains as to the applicability of the exemption when the activities of competing Capper-Volstead cooperatives are in issue. In this connection it is interesting to note that Judge Holtzoff, who subsequently presided over the trial of Maryland and Virginia in a preceding case, held that the exemption obtained where

two competing Capper-Volstead milk-producer cooperatives were charged with engaging in a conspiracy to fix prices for milk sold to distributors. United States v. Maryland Cooperative Milk Producers, 145 F. Supp. 151 (D.D.C. 1956). It is difficult, however, to reconcile this case with the "Legitimate Objects" test spelled out by the Supreme Court in Maryland and Virginia which condemned combinations of competitors to suppress independent producers, processors or dealers, even though in that case the other party to the combination did not come within the scope of the Capper-Volstead exemption. In effect, the Maryland Cooperative Milk Producers case has been overruled, 29/ and it is safe to say that should two competing Capper-Volstead cooperatives indulge in a combination or conspiracy for predatory purposes or with the intent of fixing prices, it is doubtful that such activities would in the future be held as coming within the scope of the immunity conferred by Capper-Volstead.

There has been considerable speculation as to the application of the intra-enterprise conspiracy theory to federations of cooperative associations. Federated marketing agencies formed from a federation of agricultural or fishing cooperatives were not specifically authorized by the law but it was generally assumed that such federations were exempt. 30/ The question has now been ruled on by the Supreme Court. Farmer cooperatives are not subject to the same antitrust restrictions on the intra-enterprise

conspiracy theory as are ordinary business corporations and their subsidiaries. Reversing the Ninth Circuit, 31/ a unanimous Supreme Court in Sunkist Growers, Inc., et al. v. Winckler & Smith Citrus Products Company, 370 U.S. 19 (1962), 32/ held the antitrust laws inapplicable to agreements between a citrus grower's cooperative, its subsidiary non-profit stock corporation and another stock company owned by local associations that are members of the parent cooperative. The Court held that Section 6 of the Clayton and the Capper-Volstead Acts allowed a cooperative to form a single entity to handle collectively all the processing and marketing of citrus fruits. 33/ Ruling that the statutory exemption applied, the Court treated the three separate legal entities as a single cooperative organization, stating:

> ". . . To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts . . . ." 34/

The Court noted that there was no indication that the use of separate corporations had any economic significance or that outsiders dealt with the three entities as independent organizations. It is significant that the Court concluded its opinion by stating the decision should not be taken in any way as detracting from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups and for monopolization. 35/

Considered together, the three leading Supreme Court decisions on the subject lead to the following conclusions: in the case of combinations between a qualified Capper-Volstead cooperative with a non-qualified person or firm the exemptions do not apply and the cooperative's activities with other persons are subject to the same antitrust prohibitions as those of any other business entity. Where the cooperative has a legitimate business relationship with other qualified cooperatives or with its own members or subsidiaries, the exemption from antitrust will be allowed provided that the particular activity is within the legitimate object of the cooperative's function involving no predatory activities. Moreover, on the basis of the Maryland and Virginia and Borden cases, it is a fair assumption that combinations of non-federated cooperatives and conspiracies between qualified cooperatives are outside the scope of the exemption. Where the relationships of qualified cooperatives with each other are in issue, the courts will apply the "Legitimate Objects" test, proceeding on a case-by-case basis to examine the methods and intent of these associations. This interpretation harmonizes Borden, Maryland and Virginia, and Sunkist. Sunkist, of course, went no further than holding that a combination of related cooperatives was not in and of itself unlawful. Although the case gives some sanction

to joint marketing activities by federated cooperatives, predatory practices, in my view, would immediately remove the exemption from the cooperative associations, whatever their relationship.

Commission Proceedings Under The Federal Trade Commission and Robinson-Patman Acts

The Commission has had occasion to rule on the practices of cooperatives under its organic statute, the Federal Trade Commission Act, 36/ in a number of instances. I will touch upon three of these proceedings, selected not so much because of their legal significance but because they illustrate the diversity and range of problems facing this agency when a farmer's or business cooperative is brought within the regulatory net. The first case I would like to discuss is that of Atlas Supply Co., et al., 48 F.T.C. 53 (1951). In that case the Commission charged the Atlas Supply Company, a subsidiary of the Standard Oil Companies of Kentucky, Ohio, California, Indiana and New Jersey, with violating Sections 2(c) 37/ and (f) 38/ of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. 39/ The Standard companies had joined together to cooperatively purchase their requirements of tires, batteries and accessories through Atlas, a subsidiary whose stock they owned in equal part and whose net earnings were paid as dividends on a patronage basis to the stockholders. In effect, these major oil companies, which had been divorced by the

dissolution of the Standard Oil trust in 1911, had organized their own buying cooperative. The Commission adopted the initial decision of the hearing examiner, finding violations on all three counts. I shall pass over quickly the Clayton Act counts and merely note that under Section 5 the Commission found that respondents had agreed and combined among themselves to utilize the influence of their combined purchasing power in order to purchase TBA products at illegally discriminatory prices and to obtain other preferential treatment from suppliers not available to their competitors. Among other prohibitions, the order enjoined the respondents from the conspiratorial use of their combined purchasing power to obtain preferential prices. The Commission, it may be noted, in this instance found that as a result of the challenged practices respondents increased their market control in the purchase of and resale of TBA products from a negligible share to approximately 10%.

The case is of interest primarily because of the size of the companies involved; usually, of course, when we think of businessmen's cooperatives we think in terms of small business banding together to equalize their bargaining power with other segments of the economy with which they would otherwise be at a disadvantage. Obviously, that concept does not fit the Atlas case. The case is of further interest because of the Section 5 attack upon

collective and cooperative use of bargaining power to secure preferential prices. To my knowledge it has been the Commission's policy to proceed under the Robinson-Patman Act in its succeeding buying group cases. It is interesting to speculate, in view of the barriers set up by Automatic Canteen 40/ to prosecution under Section 2(f) whether Section 5 charges, in light of the precedent of Atlas, would not have been a more effective medium of law enforcement in this area.

Proceedings against agricultural cooperatives involve, on occasion, difficult questions as to the proper scope of the remedy when the Commission action also to some extent impinges on areas subject to regulation by the Department of Agriculture. A recent and conspicuous example of a problem of this nature is Central Arkansas Milk Producers Association, Inc., et al., Docket No. 8391 (1964). In that case the cooperative, composed of approximately 1,500 dairy farmers located in the states of Arkansas, Louisiana, Oklahoma and Missouri, was charged with violating Section 5 of the Federal Trade Commission Act by conspiring and utilizing coercive tactics to ensure that the association would supply all the raw milk requirements of certain processors at premium prices established by respondents in excess of the minimum prices established as reasonable by the U. S. Department of Agriculture under Federal milk marketing orders. Count II of the complaint alleged that

the respondent association discriminated in price between purchasers of raw milk in competition with each other, in violation of Section 2(a) of the Robinson-Patman Act. Under Count I the examiner found the record established that respondent by threats and coercion had induced certain milk handlers to purchase all their requirements from the cooperative and that these were unfair trade practices within the scope of the complaint. In addition, he sustained the price discrimination charge. On appeal the provisions in the order relating to the Section 5 charges did not present problems of consequence. Under the price discrimination count, however, the examiner had issued a broad order flatly prohibiting price discriminations without reference to the fact that the respondent cooperative was operating under several milk marketing orders to which it had to conform its pricing. The stage was set for a collision between the Commission and the Department of Agriculture, the Commission acting under the aegis of the Robinson-Patman Act and Agriculture under the Agricultural Marketing Agreement Act of 1937. 41/ The Department of Agriculture, joining with respondents in appealing the initial decision, objected that the examiner's proposed order would require absolute identity in the price of milk of the same grade and quality delivered to all purchasers and for all uses, disregarding that the association's milk was subject to several marketing orders. Agriculture contended that the

order's requirement for price uniformity conflicted with the Agricultural Marketing Agreement Act and the marketing orders thereunder to which the cooperative's milk was subject. Fortunately, at the oral argument it became apparent that counsel were amenable to negotiations to obviate these problems and the Commission subsequently adopted a consent order in effect providing that price differentials permitted or required by milk marketing orders were not to come within the scope of the order's prohibitions. In short, this case presents an interesting example of the problems facing the agencies in charge of implementing antitrust when agricultural cooperatives, to a very real degree, are beyond their reach as a practical matter because of specific regulatory authority conferred on the Secretary of Agriculture by such laws as the Agricultural Marketing Agreement Act in addition to the statutory exemptions such as the Capper-Volstead Act.

Certainly no discussion of cooperatives of businessmen or distributing cooperatives would be complete without reference to the Federal Trade Commission's advisory opinion on proposed joint advertising by groups of retail druggists and the furor occasioned thereby. It will be recalled that on October 24, 1962, representatives of groups of retail druggists requested an advisory opinion from the Commission concerning the legality of cooperative advertising schemes to be undertaken by groups of retail druggists. In this connection the Commission advised:

> "To the extent that any aspect of the plan would involve a common understanding, agreement, or approval by members of the group, express or implied, of any price, term, or condition of sale of any item advertised by the group, the plan would contravene laws entrusted to the Commission for enforcement. In this connection, it is the Commission's opinion that the group publication of an advertisement containing any selling price raises a serious question whether the members of the group have agreed to and will sell at those prices. . . ." 42/

The majority of the Commission noted that it was in no position to give its approval to any plan containing such a basic flaw. Prior to the issuance of the Commission's advisory opinion on January 15, 1963, the Commission had been advised that on the basis of the same information the Antitrust Division of the Department of Justice had taken the position that the granting of clearance on this matter would be inconsistent with the antitrust laws.

The Commission's opinion subsequently became public and drew immediate Congressional attention. Quickly Senator Hubert Humphrey (D. Minn.) introduced S. 1320, a bill to exempt joint cooperative advertising of prices by small business groups, 43/ and the Select Committee on Small Business of the House of Representatives held hearings on this problem on May 3, 1963, at which representatives of the Federal Trade Commission and the Antitrust Division of the Department of Justice testified. 44/ Thereafter, the Committee issued a report 45/ in which it concluded that the hearings had cleared the air in making it plain that neither the Department of Justice nor the Federal

Trade Commission would institute proceedings against small retailers simply for publishing cooperative ads containing prices. Moreover, the report gave a broad hint that action by the enforcement agencies against this type of group activity by small retailers would not be in the public interest.

For my part, it is still my view that the Commission could not properly have given blanket approval to the practices defined in the request for the advisory opinion even though, as a general matter, the Commission itself does not intend to proceed against activities of this nature by retailers in the small business category. Our advice was sought as to the legality of this practice and clearly it would be impossible to predict with finality for all time the actions of the antitrust enforcement agencies in what is a borderline area presenting complex economic and legal questions. On the other hand, it is safe to say that in the absence of unusual circumstances the Commission, at any rate, is unlikely to devote its limited funds and manpower to questions of this nature since there are other practices of greater public interest and economic significance demanding our attention. The lesson to be drawn from our experience on the Advisory Opinion on Joint Advertising seems to be simply this: that the legislative and public concern with equalizing the economic power of small business

through cooperative action is still very strong, and one that the enforcement agencies cannot ignore if they wish to continue receiving public support.

As indicated previously, the business cooperatives with which the Commission deals, in contrast to the farmer cooperatives, are a variegated and non-homogenous group. Nor do the businessmen's co-ops enjoy the specific statutory definition conferred on farmer co-ops by Congress. Section 4 of the Robinson-Patman Act, 46/ the legislative statement encouraging cooperatives in this area, provides that nothing in the Act is to be construed as preventing a cooperative from returning the whole or part of its net earnings or surplus to its members, producers or consumers in proportion to their purchases or sales from, to or through the organization. This section, however, has not been meaningful in defining the activities permissible for businessmen's cooperatives, for it throws no light on the threshold question as to precisely the activities in which such an association may engage to earn the surplusses or profits which it has a statutory authority to distribute. Clearly, businessmen's cooperatives do not have exemption from the antitrust laws generally or the Robinson-Patman Act specifically. Nevertheless, the question remains what standards should be applied to these groups in determining whether a violation of law has been committed. In addressing myself to this problem I must

necessarily, because of limitations of time and space, and the fact that several cases are still pending in this area limit myself largely to a general outline of the problems confronting the Commission in the buying group cases.

Recently, most of the Commission's activity relating to buying groups under the Robinson-Patman Act has taken place in the automotive parts industry. The first cases instituted in this area involved the practice of granting favorable prices to cooperative buying groups of jobbers who consolidated their orders to qualify for larger discounts under a supplier's discount pricing schedule. These were typically a rebate payable on total purchases by a buyer during a previous base period, or, in other words, a cumulative quantity discount. In the earlier cases the cooperatives performed no services and they were in reality no more than a bookkeeping device for the collection of rebates or discounts received from sellers on the purchases of the association's jobber members. On this set of facts the courts had no difficulty in finding that the suppliers had violated Section 2(a) of the Robinson-Patman Act. 47/

The problems became more complex as the automotive jobber buying groups changed their method of operation from bookkeeping devices to one where they took upon themselves certain of the distributional functions formerly served by suppliers or by other distributors. At this point more

difficult problems of policy came into play. Certain groups began to acquire warehousing facilities, ordering the parts from suppliers, taking receipt of the parts and effecting distribution to the jobber members. Orders by the groups' members direct to the suppliers and shipments by suppliers directly to the jobbers were substantially eliminated. Cumulative quantity discounts condemned by former proceedings were replaced by purported functional discounts characterized as "redistribution" or "warehouse distributors" discounts.

As the groups have taken on more distributive functions the Commission is increasingly faced with the problem of determining the identity of the purchaser in the particular case for the purposes of that proceeding. If on the facts of a specific case it is determined that the group rather than its members is the purchasing entity, then the Commission will have to face the issue of whether or not there is in fact an actionable discrimination since the buying group and the warehouse distributors in the automotive parts field apparently have generally received the same redistribution discounts. In the past it had generally been the Commission's theory that the co-op's members were the actual purchasers and that irrespective of the function performed the discriminatory price had an adverse impact on the non-favored customers competing

with the group's members. As we get more experience in the light of new developments, we will be better able to decide whether some of our concepts in the area require rethinking or reorientation.

Turning to Section 2(c), the most significant recent case dealing with the relationship of a cooperative purchasing association to that section of the Robinson-Patman Act, is Central Retailer Owned Grocers, Inc., et al. v. Federal Trade Commission, 319 F.2d 410 (7th Cir. 1963). That case to a considerable extent focuses on the same policy problem. In that case the Commission found thirty-five retailer-owned grocery wholesalers had utilized a cooperative buying organization as an agent to secure private label goods for the members. It held further that when Central demanded and received lower prices on the basis of its "unique way of doing business", the cooperative required compensation for services it performed for its members and thus was receiving payments in lieu of brokerage. 48/ The Seventh Circuit reversed, overturning the Commission's finding that Central was the buying agent of its members, finding instead that Central was not a broker since it purchased on its own account, was billed by the sellers and reimbursed the suppliers. In short, the court held Section 2(c) inapplicable. Further, the court found that Central

was able to secure favorable prices because of the functions which it performed for the suppliers, first giving them an assured volume of business, reducing the credit risk, cutting down on billing work, as well as Central's advance commitments for later requirements. The court reasoned that as a result the suppliers knew that in selling to Central they were realizing savings in their business operations, enabling the group's members in turn to benefit when they purchased from the buying group.

I cannot help feeling that the court's decision turned largely on the fact that it felt that Central represented "a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer" and that this made these independent grocers stronger in competition with the large chain stores. It seems to me at any rate that as far as the court was concerned the decision to reverse the Commission's finding that Central was an intermediary of its members resulted in large part from its feeling that Central was performing a valuable competitive function enabling independent merchants to survive.

In short, the buying group cases pose the question of the extent to which the Commission in enforcing the Robinson-Patman Act should encourage the formation of

buying groups for the purpose of strengthening small businessmen's buying power through joint action as opposed to the protection of the small unorganized merchant who may be at a disadvantage with his more organization-minded brethren. The classic judicial delineation of this dilemna was given by the Fifth Circuit in a decision affirming the Commission's cease and desist order against an automotive parts buying group when it stated:

> "If this is to entrench further the large chain store automobile gasoline dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off this huge and overpowering rival, injure even unwittingly a smaller one. . . ." 49/

Conclusion

The more recent developments do not lend themselves to easy generalizations on the manner in which the Commission or the other enforcement agencies can best harmonize the antitrust laws and the cooperative movement in order to enable the smaller units of the economy to compete more effectively. One conclusion seems warranted, however. With some exceptions, the concurrent development of the antitrust laws and of the cooperative movement has been marked by a concomitant trend toward relaxation of antitrust strictures as far as cooperatives are concerned,

either by way of specific legislative exemption or more informally on a case-to-case basis by the standards set for determining the public interest in proceeding with a particular case or by requiring a more rigid standard of proof to establish a violation of law. With the exception of hard core violations involving predatory practices, in the case of small business or farmers' cooperatives, it may be expected that the Commission will increasingly look at the economic and competitive function of the particular cooperative and where permissible, will apply the rule of reason. This, I believe, is a healthy development but if it is to have a continuing beneficial effect, the antitrust enforcement agencies and the courts must, in reality, take a searching look at the individual cooperative. For example, a business co-op may range from a buying group of independent retail druggists to an association of leading department stores or even, at the extreme end of the spectrum, a group of major oil companies banded together to enjoy more favorable purchasing. The competitive impact of each varies and a judicious antitrust enforcement policy requires recognition of that difference in the particular case.

FOOTNOTES

1/ Galbraith, American Capitalism, The Concept of Countervailing Power, Houghton Mifflin Company (1952), p. 145; see also Justice Frankfurter's opinion in Tigner v. Texas, 310 U.S. 141, 145 (1940).

2/ U.S. News & World Report, June 22, 1964, p. 22.

3/

Kind of Co-Op	Number of Co-ops	Members (000)	Annual Business (000)
Credit unions	20,902	12,839	$ 606,903 savings 384,727 loans
Cooperatively-oriented insurance companies	9	11,000	321,716
Group health plans	178	4,552	259,300
Farm supply co-ops	3,297	3,600	2,408,157
Farm marketing co-ops	5,828	3,622	9,293,932
Rural electric co-ops	986	4,422	568,718
Rural telephone co-ops	3,630	500	24,000
Federal land banks	763	380	2,782,000 *
Production credit associations	487	535	2,300,000
Major co-op consumer goods centers	46	154	94,065
Housing co-ops	497	121	129,000
Student co-ops	500	50	11,000
Memorial associations	100	100	750

SOURCE: The Cooperative League of the USA, Cooperatives USA, 1961-62.

* These figures, which are subsequent to the other data in the chart, are taken from the Annual Report, Farm Credit System (1962-1963) and were obtained from Mr. David Angevin, Cooperative League, Washington, D. C.

4/ Staff Report to the Federal Trade Commission, Economic Inquiry into Food Marketing, Part I (1960), p. 159.

5/ Cooperative League of the USA, Cooperatives 1959-60 58 (1960).

6/ Economic Inquiry into Food Marketing, supra n. 4, pp. 160-61.

7/ 26 Stat. 209 (1890), 15 U.S.C. § 1, 2 & 3 (1958).

8/ Noakes, Exemption for Cooperatives, 19 A.B.A. Antitrust Section, 407, 410 (1961).

9/ See e.g., Burns v. Wray Farmers' Grain Co., 176 P. 487 (Colo. 1918); Ford, et al. v. Chicago Milk Shippers Ass'n, 39 N.E. 651 (Ill. 1895); Georgia Fruit Exchange v. Turnipseed, 62 So. 542 (Ala. 1913); Reeves v. Decorah Farmers' Cooperative Society, et al., 140 N.W. 844 (Iowa 1913); Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 184-189 (1948).

10/ ". . . The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." Loewe v. Lawlor, 208 U.S. 274, 301 (1908).

11/ Cf., Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 294-295 (1955). For a discussion of the considerations involving labor unions influencing enactment of the statute, see Kovner, The Legislative History of Section 6 of the Clayton Act, 47 Col. L. Rev. 749 (1947).

12/ In addition to statutes purporting to define agricultural cooperatives' exemption from the antitrust laws, Congress enacted a number of statutes designed to improve the economic climate in which they operate and to encourage their formation and growth. E.g.:

Congress provided for a system of Federal Intermediate Credit Banks to help farmers solve their credit needs. These banks were authorized to make loans to cooperatives on staple agricultural products and livestock. (42 Stat. 1454 (1923), 12 U.S.C.A. 1021.)

In 1926 an act was passed to create a Division of Coöperative Marketing in the Bureau of Agricultural Economics (44 Stat. 802, 7 U.S.C.A. 451). The purposes of this act were described by its title which read as follows:

> "An Act To create a division of cooperative marketing in the Department of Agriculture; to provide for the acquisition and dissemination of information pertaining to cooperation; to promote the knowledge of cooperative principles and practices; to provide for calling advisers to counsel with the Secretary of Agriculture on cooperative activities; to authorize cooperative associations to acquire, interpret, and disseminate crop and market information, and for other purposes."

The Farm Credit Act of 1933 (48 Stat. 257, 261, 12 U.S.C.A. 1134) authorized the organization of 12 regional banks for cooperatives and the Central Bank for Cooperatives, for the purpose of making loans to cooperatives.

The Agricultural Marketing Agreement Act of 1937 provides that:

> ". . . The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." (49 Stat. 767 (1935), 50 Stat. 246 (1937), 7 U.S.C. 610(b) (1) (1958).)

Similar provisions were included in the Soil Conservation and Domestic Allotment Act, enacted in 1935 as amended in 1938 (52 Stat. 31, 32, 16 U.S.C.A. 590 h (b)).

State legislatures also passed extensive legislation to further the cooperative movement. See statutes collected in Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181 (1948).

These references are merely illustrative and do not pretend to cover all legislation relating to agricultural cooperatives, much less to fishery cooperatives, labor unions and other types of cooperatives.

13/ 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

14/ Comment, 43 Neb. L. Rev. 73, 76-77 (1963).

15/ Cf., Evans and Stokdyk, The Law of Agricultural Marketing Co-operative Marketing, The Lawyer's Co-operative Publishing Company 1937, 109; Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 393 (1958).

16/ 42 Stat. 388 (1922), 7 U.S.C. § 291, 292 (1958).

17/ 48 Stat. 1213-14 (1934), 15 U.S.C. §§ 521-22 (1958).

18/ See Saunders, The Status of Agricultural Cooperatives Under the Antitrust Laws, 20 Fed. B.J. 35, 36-40 (1960).

19/ See Maryland & Virginia Milk Producers Ass'n v. United States, 167 F. Supp. 45, 50 (D.D.C. 1958), where the trial judge held a cooperative can qualify under Capper-Volstead if it does not deal in products of non-members to an amount greater in value than that handled for members and, if it either requires one member one vote, or does not pay its members in excess of an 8 percent annual dividend.

20/ The practice the Court found illegal in that instance was a conspiracy between a Capper-Volstead cooperative, Chicago milk distributors, labor unions and others for the purpose of fixing prices and to control the milk supply in the area.

21/ 28 F. Supp. 177, 183 (N.D. Ill. 1939), rev'd, 308 U.S. 188 (1939).

22/ 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

23/ 362 U.S. 458, 467 (1960).

24/ Cf., Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900, 907 (D. Mass. 1954).

25/ 167 F. Supp., supra n. 19, at 53.

26/ E.g., Stark, Capper-Volstead Revisited, American Cooperation, American Institute of Cooperation (1960) 453, 464; Comment, 43 Neb. L. Rev. 73, 95 (1963); cf., Saunders, supra n. 18, at 53.

27/ The district court decision, 167 F. Supp., supra n. 19, at 52, 53, insofar as it applied the Borden "Other Persons" rule, in my opinion largely confined that rule to the Sherman Act charges. On review the Supreme Court did not explicitly apply the Borden rule to the merger situation.

28/ Stark, Capper-Volstead Revisited, supra n. 26, at 464.

29/ See note, 36 Ind. L.J. 497, 506 (1961).

30/ ". . . Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act through centralized marketing agencies in disposing of the products of their members, and that they should, in representation of their members, hold stock in such centralized marketing agencies; I can not doubt, in view of the purposes of the Capper-Volstead Act, that such methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute". 36 Ops. Att'y Gen. 326, 339-40 (1930); see also, Cooperative Marketing Act, 44 Stat. 802 (1926), 7 U.S.C. § 453(a) (1958).

See also, Noakes, supra n. 8, at 418; Mischler, Agricultural Cooperative Law, supra n. 15, at 394; Att'y Gen. Nat'l Comm., Antitrust Laws Rep. 308 (1955); Jensen, "The Bill of Rights of U.S. Cooperative Agriculture", supra n. 9, at 190.

31/ Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960), rev'd, 370 U.S. 19 (1962).

32/ This case involved a treble damage action by a processor of by-product oranges against Sunkist Growers, Inc., the parent cooperative which processed and marketed citrus fruits for 12,000 growers in Arizona and California. "[T]he individual growers involved each belong to a local grower association. Fruit which is to be sold fresh is packed by the

associations and marketed by Sunkist, a non-stock membership corporation comprised of district exchanges to which the associations belong. Most fruit which is to be processed into by-products is handled by Exchange Orange, a subsidiary of Sunkist, or by Exchange Lemon, a separate organization comprised of a number of Sunkist member associations. It is then marketed by the products department of Sunkist which is managed by directors of Exchange Orange and Exchange Lemon." 370 U.S. 19, 22 (1962). The complaint charged that the defendants conspired to combine and monopolize trade. The Supreme Court granted certiorari limited to the issue of immunity of the inter-organization dealings among the three cooperatives from the conspiracy provisions of the antitrust laws.

33/ ". . . The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. . . ." 370 U.S. 19, 28 (1962).

34/ Id. at 29.

35/ Id. at 30.

36/ 38 Stat. 717 (1914), as amended, 15 U.S.C. Sec. 41 et seq. (1958).

37/ 49 Stat. 1526, 1527 (1936), 15 U.S.C. Sec. 13(c) (1958).

38/ 49 Stat. 1526, 1527 (1936), 15 U.S.C. Sec. 13(f) (1958).

39/ 38 Stat. 719 (1914), as amended, 15 U.S.C. Sec. 45 (1958).

40/ Automatic Canteen Company of America v. Federal Trade Commission, 346 U.S. 61 (1953).

41/ 48 Stat. 31 (1933), as amended, 50 Stat. 246 (1937), 7 U.S.C. 601 et seq. (1958).

42/ Trade Reg. Rep. Paragraph 50,183.

43/ To date there have been no hearings or other actions on this bill.

44/ Hearing Before the Select Committee on Small Business, House of Representatives, on FTC Advisory Opinion on Joint Ads, 88th Cong., 1st Sess. (1963).

45/ H.R. Rep. No. 699, 88th Cong., 1st Sess. (1963).

46/ 49 Stat. 1528 (1936), 15 U.S.C. § 13(b) (1958).

47/ For example, the court in Standard Motor Products, Inc. v. Federal Trade Commission, 265 F.2d 674, 676 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959), condemned the practice, stating:

> ". . . the buying groups brought into being by the widespread use of these discounts make no improvement in the efficiency or real cost of distributing auto parts to the public, but, as is clear from the testimony of Standard's own witnesses, function entirely through their aggregate buying power.

48/ The Commission, in finding that the group was the agent of the buyers and not the purchaser in these transactions relied on the Articles of Incorporation, stating it was Central's function to provide a purchasing organization for the members, and to effect savings through bulk purchasing to be distributed to the members on a percentage basis. The Commission further based this finding on the fact that Central resold to no one except its members, its negotiations with suppliers were based on the members' advance estimates and that it could not as a practical matter make purchases except for its members since it did not warehouse the merchandise. The Commission found, on the basis of the foregoing, that Central's purchases were geared solely to the needs of its members, concluding therefore that a finding that the cooperative was acting in an independent capacity would be inconsistent with the facts of the record. Commission opinion, Docket 7121, pp. 5-6.

49/ Mid-South Distributors, et al. and Cotton States, Inc., et al. v. Federal Trade Commission, 287 F.2d 512, 520 (5th Cir. 1961), cert. denied, 368 U.S. 838 (1961).