AGRICULTURAL ANTITRUST LIABILITY: WHAT ABOUT THE "REASONABLE FARMER?"

By John C. Monica, Jr. †

I. INTRODUCTION

The United States Department of Agriculture (USDA) has calculated gross revenues of domestic agricultural cooperatives and their participating farmers at over $128 billion annually, accounting for over 2 million jobs nationwide.[1] The National Council of Farmers Cooperatives (NCFC) has identified more than 3,000 agricultural cooperatives in the United States alone and counts approximately

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1. STEVEN DELLER ET AL., UNIV. OF WIS. CTR. FOR COOPS., RESEARCH ON THE ECONOMIC IMPACT OF COOPERATIVES 18 (2009), http://reic.uwcc.wisc.edu/sites/all/REIC_FINAL.pdf.

2,500 of them as members.[2] NCFC claims that most of the nation's 2 million farmers and ranchers are members of at least one agricultural cooperative.[3]

Over the past decade, there have been significant legal attacks on the traditional antitrust immunities provided to farmers through membership in Capper-Volstead Act-protected agricultural cooperatives.[4] A cluster of major lawsuits have been filed seeking hundreds of millions of dollars in purported actual and treble damages from unwitting farmers who have done their best to comply with their cooperative's antitrust requirements and federal and state antitrust laws.[5] This article explores some of the pitfalls faced by farmers in these cases.

The most basic agricultural cooperative can be thought of as a collection of farmers jointly marketing their products in order to bargain for a better price than they could obtain individually.[6] Cooperatives comprised of other smaller cooperatives are also popular structures.[7] While these organizations are typically formed

2. *About Co-ops*, NAT'L COUNCIL FARMER COOPS., http://ncfc.org/about-co-ops (last visited Apr. 19, 2017); *see also* RURAL DEV., USDA, CO-OPS 101: AN INTRODUCTION TO COOPERATIVES 17 (2012) [hereinafter CO-OPS 101] (stating "[i]n 2011, farmer cooperatives had more than 2.2 million members (many farmers belong to more than one cooperative) and generated a total gross business volume of $213.4 billion. Total net earnings (adjusted for losses) were $5 billion. Combined assets of the group totaled $78.5 billion and liabilities were $50.6 billion, leaving member equity of $27.9 billion.").

3. *About Co-ops*, *supra* note 2.

4. *See* 7 U.S.C. §§ 291-292 (2012); *see generally* DONALD A. FREDERICK, USDA, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT (2002) (laying out an excellent review of the Capper-Volstead Act and its legislative history).

5. *See, e.g.*, *In re* Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 688-89 (E.D. Pa. 2007).

6. CO-OPS 101, *supra* note 2, at 1 (stating, "[t]here is no universally accepted definition of a cooperative. In general, a cooperative is a business owned and democratically controlled by the people who use its services and whose benefits are derived and distributed equitably on the basis of use."). However, there are several generally accepted types of agricultural cooperatives. Some are known as "supply" cooperatives that focus on purchasing and distributing equipment, services, feed, seed, etc. that farmers need to operate. There are also "credit" cooperatives that offer credit and financing to farmers to assist in their farming operations. *See, e.g.*, *About Co-ops*, *supra* note 2; *see also* CO-OPS 101, *supra* note 3, at 20 ("Created in 1916, the cooperative Farm Credit System is the nation's oldest and largest financial cooperative. It provides real estate loans, operating financing, leasing, facility and equipment financing, real estate appraisals and crop insurance to nearly 500,000 farmers, small-town resident and cooperative borrowers nationwide.").

7. CO-OPS 101, *supra* note 2, at 13 (stating, "[m]any Cooperatives, especially local associations, are too small to gather the resources needed to provide all the services their members want. By working with other cooperatives – through federated cooperatives, joint ventures, marketing agencies in common, and informal networks – they pool personnel and other assets to provide such services and programs on a collaborative basis at lower cost.").

under state laws,[8] they often structure themselves to take advantage of the antitrust exemption provided by the federal Capper-Volstead Act, explained in more detail below.

Agricultural cooperatives may be engaged in a broad array of activities, including:

- Marketing and processing members' agricultural products;[9]
- Responding to legislative and regulatory issues affecting the industry;[10]
- Propounding voluntary animal welfare guidelines;[11]
- Exporting farmers' products;[12] and
- Milling, packaging, and shipping members' products.[13]

However, surprising to many farmers are claims that certain types of the above-listed conduct and other cooperative actions may run afoul of antitrust laws in certain circumstances unless some type of legal exemption is in place.[14] Fortunately, federal law provides a limited antitrust exemption in the 1922 Capper-Volstead

8. *See, e.g.*, TEX. AGRIC. CODE ANN § 51.001 (West 2015); 805 ILL. COMP. STAT. ANN. 315/1 (West 2016); MONT. CODE ANN. 35-17-101 (West 2016); OHIO REV. CODE ANN. § 1729.01 (West 2016).

9. *Our History*, DFA, http://www.dfamilk.com/our-cooperative/history (last visited Apr. 19, 2017) ("DFA is a leading milk marketing cooperative and dairy food processor. . . . [O]ur core business [is] marketing members' milk, paying them a competitive price and being a leader in the dairy industry.").

10. *About Us*, UNITED EGG PRODUCERS, http://www.unitedegg.com (last visited Apr. 19, 2017) (stating, "[w]e pride ourselves on working with government agencies such as USDA, FDA, EPA and others to solve problems and create programs that will move our industry forward."); *see also* CO-OPS 101, *supra* note 3, at 28 (stating, "[a] cooperative gives people a means to organize for effective political action. They can meet to develop priorities and strategies. They can send representatives to meet with legislators and regulators. These persons will have more influence because they will be speaking for many, not just for themselves.").

11. *Animal Welfare*, UNITED EGG PRODUCERS, http://www.unitedegg.com/AnimalWelfare/default.cfm (last visited Apr. 7, 2017) (indicating, "[t]oday, more than 80% of all eggs produced in the United States are produced under the UEP Certified [animal welfare] guidelines.").

12. *See United States Egg Marketers (USEM)*, UNITED EGG PRODUCERS, http://unitedegg.org/eggmarketers/default.cfm (last visited Apr. 7, 2017); *Export Assistance,* COOPERATIVES WORKING TOGETHER, http://www.cwt.coop/our-programs/export-assistance/ (last visited Apr. 19, 2017).

13. *See, e.g., Domestic Sales,* FARMERS' RICE COOPERATIVE, http://www.farmers-rice.com/who-we-are/marketing/domestic-sales/ (last visited Apr. 19, 2017); *Our Growers,* FLA.'S NAT., http://www.floridasnatural.com/who-we-are/our-growers/ (last visited Apr. 19, 2017).

14. In addition to the federal statutes discussed in this article, there are also numerous state antitrust and consumer protection laws. *See* WILLIAM T. LIFLAND, STATE ANTITRUST LAW § 1.02 (2016) (providing a comprehensive list of state antitrust laws).

Act.[15] The first section of the Capper-Volstead Act provides:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or, Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. And in any case to the following: Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.[16]

The first half of the first sentence of the Capper-Volstead Act largely stands for the proposition that cooperative members must be "farmers" or "producers" of agricultural products.[17] The remainder of the sentence broadly defines the types of

15. 7 U.S.C. §§ 291-292 (2012).

16. *Id*. § 291. The second section of the Act – 7 U.S.C. § 292 – primarily provides for enforcement authority by the Secretary of Agriculture for undue price enhancement, monopolization, and restraint of trade.

17. The proper scope and definition of "farmer" or "producer" for Capper-Volstead purposes has been raised in numerous lawsuits. *See, e.g.*, FREDERICK, *supra* note 4, at 176 ("The Supreme Court decision in *Case-Swayne v. Sunkist Growers* makes it clear that only bona fide producers of agricultural products can be members of associations seeking the limited antitrust protection accorded by the Capper-Volstead Act. *But it opened a Pandora's box of problems for cooperatives and for antitrust enforcement officials in determining just who is and is not an agricultural producer*. No one disputes that a person, whose primary occupation involves tilling the soil and/or raising animals, is a producer. But things are less clear when a person is engaged in other aspects of bringing food to the market, particularly processing agricultural commodities into other products.") (emphasis added); *see also* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 386 (1967) (stating, "[t]he issue is whether Sunkist is an association of 'persons engaged in the production of agricultural products as fruit growers' with the meaning of the Capper-Volstead Act, notwithstanding that certain of its members are not actually growers. We hold it is not."). Many challenges in this area focus on whether *vertically integrated* farmers who also engage in processing of their agricultural products should be considered "farmers" or "producers" under the Act. *See, e.g.*, Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 830 (1978) (Brennan, J., concurring); United States v. Hinote, 823 F. Supp. 1350, 1358 (S.D. Miss. 1993) (stating, "[t]he court agrees with Justice Brennan that in

activities permitted by the cooperative and its members. Simply put, they, "may act together . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[18]

"Marketing" has become the operative word in this sentence and is broadly interpreted by the courts to include actual price fixing[19] and even withholding products from the market so they cannot be sold at all.[20] Cooperatives that take title to members' products and resell them are engaged in protected "marketing" under the Capper-Volstead Act.[21] Moreover, "marketing" has been interpreted more broadly than the term "sell," and also includes pure bargaining associations that never own members' products.[22]

order to resolve this issue, consideration must be given to the producer's activities, the degree of integration of the producer, and the functions historically performed by farmers in the industry."); *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1153-1154 (D. Idaho 2011) (stating, "[T]he Court agrees with Justice Brennan's concern . . . [A] factually-intense inquiry is necessary – one which focuses on the economics and history of potato marketing, the actual functions of the associations and the degree of integration of the participants. From that evaluation, a determination must be made as to whether granting Capper-Volstead exemption here would be consistent with the legislative intent to create an environment in which farmers can compete on a level playing field."). The author believes that only pure processors are not "farmers" or "producers" under the Act. Farmers with processing capabilities are still "producers." Most modern farmers have at least some degree of vertical integration. *See, e.g.*, *Vertical Integration,* NAT'L CHICKEN COUNCIL, http://www.nationalchickencouncil.org/industry-issues/vertical-integration/ (last visited Apr. 19, 2017). Additionally, the Capper-Volstead Act itself expressly protects collective "processing." 7 U.S.C. § 291.

18. 7 U.S.C. § 291.

19. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960) ("This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, *fix prices* at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws.") (emphasis added); N. Cal. Supermarkets v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 992 (N.D. Cal. 1976) ("I agree. I find that Central's activities, including *price-fixing*, fall within the scope of protection from the antitrust laws afforded by Section 6 [of the Clayton Act] and Capper-Volstead.") (emphasis added), *aff'd,* 580 F.2d 369 (9th Cir. 1978).

20. *See, e.g.,* Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1188 (8th Cir. 1982) (finding a cooperative's "sponsorship of a two week milk withholding action" protected by the Capper-Volstead Act.).

21. *See, e.g.*, Hinote, 823 F. Supp. at 1354 n.8 ("If this case concerned nothing more than the collective actions of Delta Pride's shareholders/farmers in processing and marketing their own fish, the court would be compelled to find their activities exempt from antitrust liability under the Capper-Volstead Act.").

22. *See, e.g.*, Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 215 (9th Cir. 1974); *see also* FREDERICK, *supra* note 4, at 198 ("Thus, the [*Treasure Valley*] Court established that producers, who limit their joint activity to negotiating farm gate

Despite the exemptions from antitrust liability provided by the Capper-Volstead Act and Section Six of the Clayton Act,[23] agricultural cooperatives have been the subject of numerous antitrust lawsuits. Once a case is filed, plaintiffs introduce creative arguments to attempt to defeat statutory antitrust exemptions so liability attaches along with potential compensatory and treble damages and attorney fees. There are three recurring arguments made by plaintiffs regarding why the Capper-Volstead exemption should fail in their particular litigation:

(1) The structure of the cooperative at issue does not conform to the requirements of the Act, e.g., not all members of the cooperative are "farmers" or "producers," or other structural elements of the Act are not satisfied;[24]

(2) The conduct in which the cooperative has allegedly engaged is not protected under the Act, e.g., pre-production supply management (versus post-production) is not protected, or the purported conduct is predatory;[25] and

prices with potential buyers are entitled to the same protection under the Capper-Volstead Act as those that take title to the product for resale in raw form or for manufacturing into various value added items.").

23. 15 U.S.C. § 17 (2012) (stating, "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of *labor, agricultural* or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objections thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.") (emphasis added). Among other things, the Capper-Volstead Act enhances the agricultural portion of Section Six of the Clayton Act. *See, e.g.*, Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 824 (1978) ("Similar organizations of those engaged in farming, as well as organizations of laborers, were already entitled, since 1914, to special treatment under § 6 of the Clayton Act. [T]he Capper-Volstead Act was passed to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without antitrust consequences, could perform certain functions in preparing produce for market.").

24. *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1152 (D. Idaho 2011).

25. The argument is that while a cooperative may fix prices *after* products are produced, it cannot limit the production of products in the first place. *See, e.g.*, *id.* at 1154 ("Plaintiffs contend that the list of activities protected by the Capper-Volstead Act *excludes* acreage reductions, production restrictions, or collusive crop planning. The Court agrees. . . . [f]or these reasons, the Court concludes that acreage reductions, production restrictions, and collusive crop planning are not activities protected by the Capper-Volstead Act.") (emphasis added). The author disagrees with this unduly narrow interpretation of the protections afforded by the Capper-Volstead Act. *See* Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 451, 454 (2015) ("What remains unclear is

(3) The cooperative and its members are not exempt even if they have a "good faith" reasonable belief that they are in compliance with all of the requirements of the Capper-Volstead Act.[26]

Typical plaintiffs in these lawsuits are numerous and varied. They include direct purchasers of agricultural products such as grocery store chains, food service companies, food processors, wholesalers, and food brokers, to name a few.[27] Additionally, plaintiffs' attorneys often file class actions under Federal Rule Civil Procedure 23.[28] These purported classes are typically made up of direct purchasers like those mentioned above and sometimes indirect purchasers—those who purchase the agricultural products from direct purchasers. Frequently, consumers fall into the latter category. Class actions tremendously increase litigation time and expense and can essentially force settlements if they survive through the class certification and summary judgment process and are set for trial.[29] In short, granting class certification may "create unwarranted pressure to settle non-meritorious claims."[30] Examples of the most recent significant agricultural cases are described below.

I. MUSHROOM

In the *Mushroom* multidistrict litigation, plaintiffs alleged three primary antitrust violations:

- Beginning in 2001, the mushroom producers' cooperative and its members, which allegedly controlled 60 percent of the market, purportedly agreed to set increased minimum prices that

whether agricultural cooperatives may also agree to control supply by limiting the amount their members may produce in the first place.").

26. *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d at 1158.

27. *See id.* at 1148.

28. *See generally* FED. R. CIV. P. 23(a).

29. *See In re* Nat'l Football League Players Concussion Injury Litig., 775 F.3d 570, 578 n.9 (3d Cir. 2014).

30. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (internal citation omitted); *see also In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784-85 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail; a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth."); *In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d at 578 n.9 (stating, class actions may create "inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however, small, of potentially ruinous liability.").

were, on average, 8 percent higher than prevailing rates;[31]

- Defendants allegedly eliminated competing mushroom supply by purchasing mushroom farms and reselling them at a loss, attaching to the sales deeds provisions prohibiting the growing of mushrooms on the property;[32] and

- Cooperative members also allegedly interfered with non-members' ability to sell at lower prices though group boycotts—either purportedly agreeing not to sell to such growers who needed fresh mushrooms to meet short-term supply needs and/or selling mushrooms to those growers at inflated prices.[33]

The original complaint was filed in 2006, against thirty-nine growers and their co-operative.[34]

Plaintiffs alleged the cooperative and its members were not entitled to immunity from the antitrust laws under the Capper-Volstead Act because the Act does not protect exclusionary practices, monopolization of trade, or suppression of competition with non-members.[35] Plaintiffs alleged that the cooperative's land purchases and lease/option agreements restricting the growth of mushrooms on that land was designed to foreclose competition from growers that were not members of the cooperative, which, plaintiffs alleged, is not within the realm of Capper-Volstead protected activities.[36]

II. NATIONAL MILK PRODUCERS

The National Milk Producers litigation challenged a multi-year dairy herd retirement program conducted through a large Capper-Volstead cooperative made up of smaller cooperatives.[37] Plaintiffs filed several antitrust class action lawsuits claiming that dairy farmers were paid by the cooperative to voluntarily retire complete herds of milk cows and stay out of the market for one year.[38] The program

31. Class Action Complaint at 2, *In re* Mushroom Direct Purchaser Antitrust Litig., No. 2:06-cv-00638 (E.D. Pa. Feb. 10, 2006), 2006 WL 470050 [hereinafter *In re* Mushroom Class Action Complaint].

32. *Id*.

33. *Id*. at 8.

34. *See id*. at 1.

35. *Id*. at 10.

36. *Id*.

37. Class Action Complaint at 1, Edwards v. Nat'l Milk Producers Fed'n, No. 4:11-cv-04766-JSW (N.D. Cal. Sept. 26, 2011) [hereinafter Edwards Complaint].

38. *Id*.; First Amended Class Action Complaint at 1, Stephen L. LaFrance Holding, Inc. v. Nat'l Milk Producers Fed'n, No. 2:12-cv-00070-MAM (E.D. Pa. June 29, 2012), 2012 WL

purportedly eliminated over half a million dairy cows and removed over nine-and-a-half billion pounds of raw milk from the market.[39] Raw milk prices allegedly increased 9 billion dollars, with wholesale and retail prices following.[40] Cooperative assessments funded the buyouts, and plaintiffs alleged that 2,800 small farmer participants found it impossible to reenter the market after the one-year hiatus because of a continuing oversupply of milk.[41]

Plaintiffs' primary Capper-Volstead challenge was based on the pre-production nature of the cooperative's supply management activities—retiring herds before they produced raw milk.[42] Plaintiffs also alleged that participation in the herd reduction program was open to non-members of the cooperative, which meant that members were acting together with non-members, which plaintiffs alleged was not protected under the Act.[43] The United States Department of Agriculture had recognized as early as 2005, that the "effort [was] unique because it is aimed at supply-reduction (through a combination of herd retirement programs, reduced production marketing programs, and export subsidy programs) and because participation is also open to independent farmers not affiliated with a cooperative."[44]

Tens of millions of dollars have been paid in settlements since the filing of the *National Milk Producers* litigation.[45] The cases included a direct purchaser class and an indirect purchaser class.[46] Additionally, in September 2015, one grocery store chain filed a separate case in Florida.[47]

3624841 [hereinafter LaFrance Holding First Amended Complaint]; First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n, No. 13-CV-454-NJR-SCW, 2016 U.S. Dist. LEXIS 138390, at *2 (S.D. Ill. Oct. 5, 2016).

39. Edwards Complaint, *supra* note 37, at 22.

40. *Id*. at 2.

41. Complaint, Demand for Jury Trial and Request for Injunctive Relief at 43, Winn-Dixie Stores, Inc. v. Southeast Milk, Inc., No. 3:15-cv-1143-J-39PDB (M.D. Fla. Sept. 23, 2015), 2015 WL 8481588 [hereinafter Winn-Dixie Stores Complaint & Demand for Jury Trial].

42. *Id*. at 6.

43. Edwards Complaint, *supra* note 37, at 25-26.

44. RURAL DEV., USDA, RPT. NO. 1 SEC. 16, COOPERATIVES IN THE DAIRY INDUSTRY 15 (2005) [hereinafter COOPERATIVES IN THE DAIRY INDUSTRY].

45. *See $52 Million Settlement Reached Over Dairy Industry's Nationwide Price-Fixing Conspiracy, Cow Killing*, HAGENS BERMAN (Sept. 8, 2016), https://www.hbsslaw.com/cases/dairy-price-fixing/pressrelease/dairy-price-fixing-52-million-settlement-reached-over-dairy-industrys-nationwide-price-fixing-conspiracy-cow-killing [hereinafter *$52 Million Settlement Reached*].

46. Edwards Complaint, *supra* note 37, at 4; First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n, No. 13-CV-454-NJR-SCW, 2016 WL U.S. Dist. LEXIS 138390, at *2 (S.D. Ill. Oct. 5, 2016).

47. Winn-Dixie Stores Complaint & Demand for Jury Trial, *supra* note 41, at 1; *see also*

III. SOUTHEASTERN MILK

The *Southeastern Milk* antitrust litigation involved several Capper-Volstead challenges and other legal issues. Settlements in the case totaled hundreds of millions of dollars to date.

Among other things, plaintiffs alleged that in 2001, defendants, Dean Foods and National Dairy Holdings, L.P. (NDH), two of the largest milk bottlers in the United States, entered into long-term, full-supply agreements with Dairy Farmers of America, Inc. (DFA) for the sale of raw Grade A milk to Dean Foods' and NDH's bottling plants in the Southeast;[48] which gave DFA control over access to "77 percent of the fluid Grade A milk bottling capacity in the Southeast."[49] In addition, DFA jointly owned "eight bottling plants in the Southeast which it also supplies exclusively."[50]

Plaintiffs alleged that in order to participate in the Federal Milk Program, dairy farmers were required to "deliver certain minimum quantities of their monthly milk production to bottling plants;" therefore, access to bottling plants was essential.[51] Plaintiffs claimed that DFA's "own membership in the Southeast lacked the milk production necessary to meet the requirements of its long term full-supply agreements with Dean, NDH and others."[52] Therefore, Defendants purportedly agreed that DFA would establish the Southern Marketing Agency, Inc. (SMA) and would require previously independent dairy cooperatives to join SMA before they would be allowed access to defendants' bottling plants.[53] Defendants allegedly used their control over the bottling plants to extract depressed purchase prices for raw Grade A milk from the dairy farmers and eliminate any competition in violation of Sections One and Two of the Sherman Act.[54]

One important Capper-Volstead issue in the case was the claim that the Act did not apply because the cooperative at issue purportedly "conspired" with non-

In re Fresh Dairy Prods. Antitrust Litig., 190 F. Supp. 3d 1353, 1354 (J.P.M.L. 2016) (indicating Winn-Dixie sought to consolidate their action against the National Milk Producers Federation with other pending cases in the Southern District of Illinois, but being denied such consolidation).

48. *In re* Se. Milk Antitrust Litig., No. 2:08-MD-1000, 2008 U.S. Dist. LEXIS 44541, at *6-7 (E.D. Tenn. June 6, 2008).

49. *Id*. at *7.

50. *Id*.

51. *Id*.

52. *Id*.

53. *Id*. at *7-8.

54. *Id*.

members.[55] Plaintiffs alleged that the conduct at issue involved third-party milk processors which were not true farmers or dairymen under the Act, thereby destroying the cooperative's Capper-Volstead status.[56] This issue of agreements with unprotected third parties is often raised in agricultural antitrust cases and highlights the importance of ensuring any agreements between a cooperative and non-members do not violate antitrust laws and are not predatory in nature.

Another key Capper-Volstead issue raised in the *Southeastern Milk* cases was whether the cooperative was truly operated for the benefit of its members.[57] Some of the plaintiffs were dairymen that sued their own cooperative for allegedly forcing them to sell raw milk to cooperative-controlled bottlers at reduced prices through mandatory membership in the cooperative or its subsidiaries.[58] This arrangement purportedly benefited the cooperative, but allegedly reduced the prices received by dairy farmers.[59] According to the plaintiffs, the cooperative had allegedly put its own interests first and was no longer truly operating for the mutual benefit of its members as required under the Act for Capper-Volstead status.[60]

IV. POTATOES

In the *Potatoes* litigation in Idaho, plaintiffs alleged two primary antitrust violations:

(1) Defendants purportedly engaged in a price-fixing and supply management conspiracy through regional and nationwide cooperatives formed in 2004;[61] and

(2) Defendants allegedly coordinated several restrictive actions including: (i) limiting potato planting acreages; (ii) paying farmers to destroy existing stock or not to grow additional potatoes; and (iii) reducing the overall number of potatoes available for sale.[62]

55. Plaintiffs' Opposition to Defendant Southern Marketing Agency's 12(B)(6) Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim at 11, Scott Dairy Farm, Inc. v. Dean Foods Co., No. 2:07-cv-00208 (E.D. Tenn. Nov. 28, 2007) [hereinafter Scott Dairy Farm Opposition to Motion to Dismiss].

56. *Id*. at 8.

57. *Id*. at 7.

58. *See id*. at 7-10.

59. *Id*.

60. *Id*.

61. First Amended Class Action Complaint at 2, *In re* Fresh & Process Potatoes Antitrust Litig., No. 4:10-md-02186 BLW (D. Idaho Dec. 13, 2010), 2010 WL 11020287.

62. *Id*.

Moreover, plaintiffs alleged the defendants' cooperatives and their members purportedly took numerous overt actions that destroyed the applicability of the Capper-Volstead Act's antitrust exemption, such as: (i) including in their membership rolls packers and other ineligible businesses; (ii) coordinating with foreign grower associations; and (iii) engaging in pre-planting supply restrictions.[63] So far, there have been millions of dollars in settlements paid into escrow for settlements.[64]

V. EGGS

In the *Eggs* multidistrict litigation, plaintiffs alleged three primary antitrust violations:

(1) An animal husbandry program participated in by the farmers' Capper-Volstead cooperative that increased cage sizes for egg-laying hens was an alleged subterfuge to reduce the number of eggs produced and increase prices;[65]

(2) Joint exports initiated by a separate Capper-Volstead cooperative were an alleged sham to reduce domestic egg supply and increase prices;[66] and

(3) Hen culls and coordinated molting recommended by one of the cooperatives were purportedly designed to reduce domestic egg supply and increase prices.[67]

The cases were first filed in the fall of 2008, and several defendants have since settled for over one hundred million dollars.[68] Plaintiffs are seeking trebled

63. *Id*. at 61, 67-71, 72-76

64. Indirect Purchaser Plaintiffs' Memorandum in Support of Motion for: (1) Preliminary Approval of Class Action Settlement; (2) Certification of the Proposed Classes for Settlement Purposes; (3) Appointment of Interim Co-Lead Counsel As Class Counsel for the Proposed Settlement Classes; (4) Approval of the Notice Plan and Plan of Allocation; and (5) Court Establishment of a Final Approval Hearing Schedule at 6, *In re* Fresh & Process Potatoes Antitrust Litig., No. 4:10-MD-02186-BLW (D. Idaho June 1, 2015), 2015 WL 10683016 [hereinafter Fresh & Process Potatoes Memorandum in Support of Motion].

65. Third Consolidated Amended Class Action Complaint at 51, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Jan. 4, 2013) [hereinafter Processed Egg Prods. Third Amended Complaint].

66. *Id*. at 83.

67. *Id*. at 48.

68. *See* Direct Purchaser Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement Agreement between Direct Purchaser Plaintiffs and Michael Foods, Inc. and Leave to File Motion for Award of Fees and Reimbursement of Ex-

damages, injunctive relief, and attorneys' fees.[69]

Plaintiffs claim the defendants' Capper-Volstead affirmative defense is inapplicable because the cooperatives purportedly included non-farmers and because some of the alleged anti-competitive conduct purportedly consisted of pre-production supply control efforts.[70] There were nineteen individual plaintiffs and two classes: direct purchasers of shell eggs and egg products and indirect purchasers of shell eggs.[71] Defendants were thirteen of the largest egg producers and two of their Capper-Volstead cooperatives.

VI. TUNA

In the *Tuna* multidistrict litigation, plaintiffs allege three primary antitrust violations:

(1) Starting in 2008, the big three canned tuna companies allegedly agreed to reduce can sizes and ounces, but maintain prices;[72]

(2) In 2011, the same companies allegedly coordinated to increase the list price of canned tuna;[73] and

(3) They also allegedly agreed to limit sales and promotion pricing, and to not sell "FAD free" products to customers.[74]

The multidistrict litigation order was entered in December 2015, and combined several cases into the Southern District of California.[75] In April 2016, the U.S. Department of Justice asked the court to stay discovery until after a grand jury verdict in a parallel criminal investigation.[76] Thus, it is early in the proceed-

penses from the Michael Foods, Inc. Settlement Fund at 3-4, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Jan. 5, 2017) [hereinafter Processed Egg Prods. Memorandum in Support of Motion].

69. Processed Egg Prods. Third Amended Complaint, *supra* note 65, at 145.

70. *Id*. at 122.

71. *Id*. at 2.

72. Consolidated Amended Complaint for Violation of the Sherman Act, 15 U.S.C. §1 at 16-17, *In re* Packaged Seafood Prods. Antitrust Litig., No. 15-md-02670 JLS (S.D. Cal. May 23, 2016) [hereinafter Packaged Seafood Prods. Amended Complaint].

73. *Id*. at 15-18.

74. *Id*. at 17-18 (indicating that "FAD" means Fish Aggregating Device).

75. Transfer Order at 2, *In re* Packaged Seafood Prods. Antitrust Litig., No. 3:15-md-02670 (J.P.M.L. Dec. 9, 2015).

76. Joint Stipulation Re: Ltd. Stay of Discovery at 2, *In re* Packaged Seafood Prods. An-

ings. Motions to dismiss were recently decided, and the portions of the cases pertaining to tuna products survived, while those claims pertaining to other seafood products were dismissed without prejudice.[77] The case currently has nine defendants, twenty-eight individual plaintiff companies, a direct purchaser class, and an indirect purchaser class.[78]

VII. BROILERS

In the most recent case, in September 2016, a putative class of direct purchasers of broiler chickens filed suit against thirteen of the largest domestic broiler processors in federal court in Chicago.[79] Plaintiffs alleged antitrust violations of section one of the Sherman Act that purportedly began in January 2008, when the processors started to jointly reduce broiler production in order to raise prices.[80] According to the complaint, the U.S. broiler market ranged from $21.8 billion in 2008, to $32.7 in 2014, and the named defendants controlled 90 percent of the market.[81] During the period of the purported broiler reductions, broiler market prices rose approximately 50 percent,[82] while at the same time, feed cost—a primary expense in raising broilers—fell approximately 20 percent to 23 percent.[83] Plaintiffs contend this dramatic rise in prices even though production costs fell is directly attributable to the defendants' purported conspiracy to reduce broiler supply.

Regarding defendants' alleged conspiratorial conduct, the complaint alleges that starting in the mid-2000s, broiler prices were severely depressed due to an oversupply.[84] In 2007, the two largest processors purportedly announced they were reducing supply in an attempt to raise market prices.[85] Even though they allegedly reduced their own production, their attempt was unsuccessful because their 40 percent market share was insufficient to cause the desired market-wide increase.[86]

titrust Litig., No. 3:15-md-02670-JLS-MDD (S.D. Cal. filed Apr. 21, 2016) [hereinafter Packaged Seafood Prods. Joint Stipulation].

77. *In re* Packaged Seafood Prods. Antitrust Litig., No. 15-MD-2670 JLS (MDD), 2017 WL 35571, at *10, 14 (S.D. Cal. Jan. 3, 2017).

78. *Id.* at *2.

79. *See* Class Action Complaint at 1, Maplevale Farms, Inc. v. Koch Foods, Inc., No. 1:16-cv-08637 (N.D. Ill. Sept. 2, 2016) [hereinafter Maplevale Farms Class Action Complaint].

80. *Id.*

81. *Id.* at 18, 32.

82. *Id.* at 20, 92-93.

83. *Id.* at 92-93.

84. *Id.* at 36.

85. *Id.*

86. *Id.*

Plaintiffs alleged that other processors simply took advantage of the situation and increased production to cover reductions, resulting in no net overall supply reduction.[87]

The complaint asserts that as a matter of economic theory in order for supply reduction plans to work, virtually the entire industry must participate.[88] To this end, Plaintiffs alleged that in January 2008, the two competitors, again, made supply reductions and at the same time stated publicly that they would not continue to cut supply unless their competitors joined in the effort.[89] For example, one of their CEOs purportedly announced his company was reducing supply and "'the rest[ ] of the market is going to have to pick-up a fair share in order for the production to come out of the system.'"[90] The complaint further alleges that after various industry meetings and public and private communications starting in 2008, the rest of the industry fell into line by also implementing supply reductions.[91] The complaint identifies over forty purported supply reductions by at least twelve processors, representing 90 percent of the market, between January 2008 and August 2012.[92]

Additionally, these purported 2008 to 2012 supply reductions were not done in a manner typical for the industry. Prior short term supply reductions took place on a seasonal basis and simply involved slaughtering broilers early or growing fewer adult broilers from pullet stock.[93] These new reductions were purportedly accomplished through the destruction of parent breeder stock and hatching eggs from which broilers were grown, which meant there was no quick fix if producers wanted to increase production.[94] The complaint alleges that "[t]his destruction of the Broiler breeder flock was unparalleled and the consequences continue to reverberate in the industry to present day."[95]

Finally, to enforce the purported conspiracy, the complaint alleges defendants policed each other and made sure all companies were complying with the production cuts through the use of a private agricultural statistics and data collection

87. *Id*.
88. *Id*. at 37.
89. *Id*.
90. *Id*.
91. *Id*. at 39-50 (setting forth various industry meetings and communications).
92. *Id*. at 37-50 (showing how plaintiffs attempt to tie each of these purported reductions to an immediately prior event such as a meeting, conference, or announcement by another competitor, trying to create an inference that the events and announcements were used by defendants to reach agreements to reduce supply).
93. *Id*. at 50.
94. *Id*.
95. *Id*. at 3.

company.[96] The company is alleged to have collected detailed production, supply, breeder stock, price, and sales data and projections from virtually every broiler processor in the U.S.[97] This data was then published anonymously through an expensive subscription service. However, even though the data was supposedly published anonymously, defendants allegedly figured out how to decipher it so they could determine exactly which data was attributable to each processor.[98] Accordingly, the data collection company allegedly provided a powerful monitoring and policing tool for defendants' antitrust conspiracy because all of the participants could determine whether their competitors were adhering to their anticompetitive agreement.[99] The complaint seeks injunctive relief, treble damages, and attorney's fees under the Sherman Act, claiming defendants are each jointly and severally liable for any potential recovery.[100] Additional direct purchaser class actions were filed in September 2016.[101]

Following the initial direct purchaser class action, two plaintiffs filed an indirect purchaser class action against the same defendants based on the same allegations in the same court.[102] Rather than being direct purchasers of broilers, however, the entities, allegedly, indirectly purchased broilers from direct purchasers who had first purchased them from the defendants.[103] Six additional indirect purchaser class actions were filed in September 2016 and October 2016.[104] Plaintiffs in those cases asserted a section one Sherman Act claim for injunctive relief[105] and also sought treble damages and attorney's fees under the antitrust and consumer

96. *See id*. at 23, 31, 50.

97. *Id*. at 23.

98. *Id*. at 25-26.

99. *Id*. at 29-30.

100. *Id*. at 111-12.

101. *E.g*., Class Action Complaint at 112, John Gross & Co. v. Koch Foods, Inc., No. 1:16-cv-08737 (N.D. Ill. Sept. 7, 2016) [hereinafter John Gross Class Action Complaint].

102. *See* Class Action Complaint at 5, 7, Fargo Stopping Ctr., LLC., v. Koch Foods, Inc., No. 1:16-cv-08851 (N.D. Ill. Sept. 12, 2016) [hereinafter Fargo Stopping Ctr. Class Action Complaint].

103. *Id*. at 9.

104. *See* Class Action Complaint at 112, Drucker v. Koch Foods, Inc., No. 1:16-CV-08874 (N.D. Ill. Sept. 13, 2016); Complaint at 126, Percy v. Koch Foods, Inc., No. 1:16-CV-08931 (N.D. Ill. Sept. 14, 2016); Class Action Complaint and Demand for Jury Trial at 144, Gilbert v. Tyson Foods, Inc., No. 1:16-CV-09007 (N.D. Ill. Sept. 16, 2016); Class Action Complaint at 161, Don Chavas Mexican Rest., Inc. v. Koch Foods, Inc., No. 1:16-CV-09421 (N.D. Ill. Sept. 30, 2016); Complaint at 127, Monahan v. Koch Foods, Inc., No. 1:16-CV-09490 (N.D. Ill. Oct. 4, 2016); Class Action Complaint at 151, Bodega Brew Pub, Inc. v. Koch Foods, Inc., No. 1:16-CV-09589 (N.D. Ill. Oct. 7, 2016).

105. Fargo Stopping Ctr. Class Action Complaint, *supra* note 102, at 108.

protection laws of twenty-seven states and the District of Columbia.[106] Plaintiffs filed under these state laws because federal law does not allow pass-through claims for indirect antitrust damages,[107] and the states named in the suit have enacted laws allowing indirect purchasers to recover such damages.

VIII. THE REASONABLE FARMER

Given all of the above, what happens to a reasonable farmer who does everything right, yet is pulled into one of these mega-lawsuits? As a hypothetical, he or she previously applied to become a member of a Capper-Volstead Act-protected agricultural cooperative by filling out a membership application requiring certification that the farmer actually owns "x" number of animals which it husbands on "y" acres of land owned in its own name. The application specifically states that this same information is required from all cooperative applicants, and once a farmer becomes a member, he/she must recertify the same information annually. If the entity fails to qualify as a "farmer" or to submit the required certification, they are promptly ejected from the cooperative and dropped from its rolls. The cooperative also includes, attached to the membership application, a brochure touting all of its various programs and specifically stating that it is a Capper-Volstead-protected agricultural cooperative and its members and programs are protected. To cap things off, on every major cooperative conference call and at every cooperative meeting of any significance, antitrust counsel hired by the cooperative attends and monitors activities to ensure there are no antitrust violations. In short, most objective observers would find that the cooperative—and certainly its farmer members—have acted reasonably and in good faith to ensure and maintain their Capper-Volstead-protected status.

The hypothetical fly in the ointment, however, is if one of the cooperative's older and smaller members was a farmer when it applied to be a member several years ago but now no longer actually owns or raises animals. The member failed to advise anyone of this change. Rather, the member continued to fill out and submit its annual membership recertification. This was not out of malice, but rather simply due to lack of sophistication. The member still believes in the cooperative's goals and wanted to contribute to its efforts through membership fees. Somewhere down the road, say 5 to 10 years later—which is not unreasonable in the context of these lawsuits—market prices for the type of agricultural products

106. *See, e.g.*, *id.* at 110-59 (citing statutes and common law of Arizona, Arkansas, California, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin).

107. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977).

in which the cooperative deals skyrocket and enterprising plaintiffs file class actions attempting to attribute these price increases to purported collusive conduct by the cooperative and its members.

Once a lawsuit has been filed, plaintiffs turn an eagle-eye towards the cooperative's membership rolls, looking for any potential non-farmers in an attempt to defeat the Capper-Volstead Act's antitrust exemptions. Plaintiffs are diligent and find the mistake made by the aforementioned member. What is the result in this hypothetical?

Plaintiffs would likely argue that the cooperative's Capper-Volstead status is a nullity, dating all the way back to the first faulty certification by the non-compliant member. This would arguably subject the cooperative to potential debilitating antitrust liability for all of the intervening years. Plaintiffs would also likely argue that every member farmer's Capper-Volstead protection for all of those years has also vanished—this despite the required initial application and yearly certifications from each member. This is an extremely harsh result indeed. Theoretically, liability may result for compensatory and treble damages, plus attorney's fees and costs under a federal or state law claim. The hypothetical reasonable farmer did everything in good faith he or she could to follow the law and avoid potential liability—yet now finds itself embroiled in costly litigation.

When presented with this scenario, defendant farmers may assert a "good faith" affirmative defense, arguing that they should be protected by the Capper-Volstead Act's antitrust exemptions because they acted reasonably and did everything in their power and in good faith to ensure that they themselves and the cooperative maintained their Capper-Volstead status. They were repeatedly told that the cooperative, its members, and their activities were protected, even by the cooperative's antitrust counsel. Further, although the cooperative attempted to verify every member's certification, the member farmers were not in a realistic position to do so for themselves. They could not reasonably be expected to police the cooperative's membership rolls and its members' Capper-Volstead certifications. For example, if a cooperative has 500 farmer members, are they all supposed to visit each other's farms annually to make sure their fellow members are actually farmers and Capper-Volstead compliant? This issue is not just hypothetical. It has come to the forefront of some of the antitrust litigation outlined above.[108]

The *Mushroom* case provides an example of one federal court's approach to this thorny issue.[109] There, the court ruled that a cooperative failed to qualify for

108. Peck, *supra* note 25, at 455-56 ("Losing the Capper-Volstead exemption by itself would, however impose real costs on cooperatives which would either have to avoid such conduct or factor in the cost of defending Sherman Act claims.").

109. *See generally In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382

Capper-Volstead status because a farmer mistakenly allowed the wrong corporate entity—a non-producer—to sign its cooperative membership agreement.[110] One could reasonably argue that the farmer had several corporate entities and simply wrote down the wrong entity's name on a cooperative form. The court, however, rejected the argument that the companies were so interrelated that they should be considered a single entity and that the members' good faith belief should somehow salvage the cooperative's Capper-Volstead status.[111] Instead, the court found that Capper-Volstead defense completely vanished for the cooperative *and* all of its members.[112]

Another argument addressed by the *Mushroom* court was that courts should emphasize substance and economic realities over "record-keeping formalities."[113] For example, in a prior Eighth Circuit case, the fact that "a small number of non-farmers were nominal members of [a cooperative] during certain periods" did not deprive the cooperative of its Capper-Volstead immunity because the non-farmer issue arose merely "because of ignorance or sloppiness on the part of [the cooperative] in policing its membership rolls."[114] The *Alexander* court noted "[t]he 'not even one' language in *National Broiler* cannot be divorced from that Court's emphasis on the economic role of such middlemen . . . to participate in price-fixing."[115] The court concluded that because the non-farmer nominal members did not actually exercise the benefits of membership in the cooperative, and because "[the cooperative] bylaws prohibit such persons from asserting any membership interest and there is no contention that such persons bought or sold milk through [the cooperative]," inadvertently including them in the cooperative's membership records did not destroy its Capper-Volstead-protected status.[116]

The *Mushroom* court, however, rejected this argument as applied to the facts which it was presented, finding that the membership of non-farmers there was not in fact a "technical, de minimis error," but instead the cooperative's "true purpose [was] to benefit distributors rather than growers."[117] The *Mushroom* court also

(E.D. Pa. 2014).

110. *Id*. at 391.

111. *Id*. at 392-93.

112. *See In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 291 (E.D. Pa. 2009).

113. *See id*. at 284; Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1186 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

114. *Alexander*, 687 F.2d at 1183-85.

115. *Id*. at 1186.

116. *Id*. at 1186-87.

117. *In re Mushroom Direct Purchaser Antitrust Litig*., 621 F. Supp. 2d at 284-86.

noted that the cooperative's methods of collecting dues and pricing activity allegedly benefited distributors rather than growers and that the cooperative helped unaffiliated "pure growers" to organize another cooperative.[118] On appeal, the *Third Circuit* declined to reach the merits of the issue, but stated "whether the arguably inadvertent inclusion of an ineligible member strips an agricultural cooperative of Capper-Volstead protection is both serious and unsettled."[119]

Beyond the *Mushroom* case, evaluating substance rather than formalities requires acknowledging the realities of U.S. agriculture, including the fact that many farmers organize their business into separate legal entities.[120] A bona fide reasonable farmer should not lose Capper-Volstead immunity simply because of inadvertence or administrative error. In other antitrust contexts, courts have recognized that a defendant who in good faith believed that its conduct was protected by a bona fide exemption from the antitrust laws can raise a good faith belief affirmative defense to Sherman Act claims.[121] There is a strong argument that the same should be recognized in the agricultural context.

In one analogous case involving a complex regulatory environment, *In re Lower Lake Erie*, the primary defendant claimed it should be allowed to assert the defense that it had good faith belief that its actions were exempt from antitrust scrutiny.[122] The district court agreed, gave a jury instruction on the issue, and submitted the issue to the jury.[123] The appellate court affirmed the lower court's decision on appeal, explaining that the district court had properly "instructed the jury concerning [the defendants'] good faith and regulatory climate defenses and informed the jury that, if the company's conduct was consistent with the overall policies of the ICC, it was not in violation of the antitrust laws" and that the "instruction, as a whole," was proper.[124] In a progeny case, *USX Corp. v. Adriatic Ins. Co.*, the court explained that the *In re Lower Lake Erie* court "specifically held that the instructions on the good-faith and regulatory climate defenses were accurate."[125] At

118. *Id.* at 285.

119. *In re* Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 164 n.4 (3d Cir. 2011) (punctuation omitted).

120. *See generally* Heidi Alexander, *Choosing and Securing the Right Legal Entity for Your Farm*, BEGINNING FARMER NETWORK MASS., http://bfnmass.org/blog/choosing-and-securing-right-legal-entity-your-farm (last visited Apr. 19, 2017).

121. *See In re* Lower Lake Erie Iron Ore Antitrust Litig., 759 F. Supp. 219, 225 (E.D. Pa. 1991), *aff'd in part and rev'd in part*, 998 F.2d 1144 (3d Cir. 1993); USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593, 633-34 (W.D. Pa. 2000).

122. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 759 F. Supp. at 224-25.

123. *Id.* at 225.

124. *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1160-61 (3d Cir. 1993).

125. *USX Corp.*, 99 F. Supp. 2d at 634.

least two other federal circuits have recognized similar good faith defenses in an antitrust context.[126]

Similarly, in the labor context, courts have held that a non-statutory antitrust labor exemption affords immunity from damages sought under section four of the Clayton Act for behavior under a collective bargaining agreement later determined to be illegal, if the defendants "could not reasonably have foreseen" that illegality.[127] In *Consolidated Express, Inc. v. New York Shipping Association (Conex)*, defendants argued that their challenged conduct qualified for a non-statutory antitrust labor exemption.[128] The lower court rejected that argument, holding that the conduct at issue "if the allegations (of unfair labor practices) are true, then such acts would not be immune[.]"[129] The appellate court disagreed and held that the non-statutory antitrust labor exemption immunized the defendants from liability for damages with respect to conduct that the defendants reasonably believed to be protected by the exemption.[130]

With respect to claims based on conduct that the conspiring parties reasonably believed to be legal, the court concluded that "there is room for a defense to a [Clayton Act] § 4 damage claim that would not be available in a § 16 injunctive action or a government injunctive action."[131] Specifically, the court held that once allegedly protected conduct was shown to be illegal under applicable labor law, "the defendants may assert, first, that at the time they acted. . . they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful . . . ."[132]

Other federal courts have followed *Conex*.[133] These courts found that, in light

126. *See* MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1138 (7th Cir. 1983); Hosp. Bldg. Co. v. Trs. of the Rex Hosp., 691 F.2d 678, 685 (4th Cir. 1982) (stating, "[n]one of the above mentioned health planning legislation contains an express exemption from the antitrust laws. Therefore, any exemption from the antitrust laws must be implied. . . . The appropriate rule, we find, is simply that planning activities of private health services providers are not 'unreasonable' restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities.").

127. Consol. Express, Inc. v. N.Y. Shipping Ass'n (Conex), 602 F.2d 494, 521 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).

128. *Id.* at 501.

129. *See id.* at 519; Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n, 483 F.2d 384, 402 (3d Cir. 1973).

130. *Conex*, 602 F.2d at 521.

131. *Id.*

132. *Id.*

133. *See* Feather v. United Mine Workers of Am., 711 F.2d 530, 542 (3d Cir. 1971);

of *Conex* and its progeny, a "reasonable belief" test was justified under the non-statutory labor antitrust exemption because it balances the need to further collective bargaining encouraged by labor law against the need to deter anticompetitive behavior. Just the same, a "good faith" or "reasonable belief" test for Capper-Volstead immunity properly balances the need to protect agricultural cooperatives encouraged by federal law against the need to deter anticompetitive behavior.[134]

In the *Mushroom* case, defendants argued that "immunity from claims under section one of the Sherman Act should apply to 'agricultural producers who come together in good faith and form an agricultural cooperative based on counsel's advice that the cooperative was properly constituted[.]'"[135] The court analyzed the farmer's application of the good faith defense as a simple reliance on counsel defense, and rejected the defense on the grounds that such a defense is "generally warranted only where the offense alleged involves willful and unlawful specific intent."[136] The court did not analyze the good faith defense as a defense that was part and parcel of the immunity.[137]

In the *Eggs* case, a farmer tested whether the court would recognize the good faith affirmative defense based on the Capper-Volstead Act in an agricultural context.[138] The farmer argued that a good faith defense to antitrust charges had been recognized by courts in the labor context,[139] which it claimed was analogous to the agricultural context.[140] Specifically, the farmer pointed out the Third Circuit previously held that a labor union is immune from antitrust damages resulting from collective bargaining conduct due to its good faith defense.[141]

The defendant explained that the good faith antitrust exemption in the labor context arises from section six of the Clayton Act which states:

The labor of a human being is not a commodity or article of commerce.

Combs v. Associated Elec. Coop., 752 F. Supp. 1131, 1133, 1136, 1141 (D.D.C. 1990); Copper Valley Coal Co. v. United Mine Workers of Am., 753 F. Supp. 580, 582-83 (W.D. Pa. 1990); Casper v. SMG, 389 F. Supp. 2d 618, 620-21 n.6 (D.N.J. 2005).

134. *See Conex*, 602 F.2d at 521.

135. *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 391 (E.D. Pa. 2014).

136. *Id.*

137. *See id.* at 382.

138. Rose Acre Farms, Inc.'s Post-Hearing Memorandum in Support of its Motion for Summary Judgment at 5, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Apr. 4, 2016) [hereinafter Rose Acre Farms Post-Hearing Memo].

139. *See Conex*, 602 F.2d at 520-21; *see also* Feather v. United Mine Workers of Am., 711 F.2d 530, 542-43 (3d Cir. 1983).

140. Rose Acre Farms Post-Hearing Memo, *supra* note 138, at 6.

141. *Id.*; *see Feather*, 711 F.2d at 542-43.

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of [*labor*, *agricultural]*, or horticultural organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[142]

The farmer noted that the exact same provision of the Clayton Act giving rise to the labor good faith line-of-reasoning, also covered agricultural organizations such as the cooperatives in question.[143] Thus, the defendant argued that the same result should apply in the agricultural context, and the court should recognize its good faith Capper-Volstead affirmative defense.[144] Additionally, the farmer explained that a good faith antitrust defense had been recognized by other courts when defendants were faced with complex regulatory schemes that were difficult to navigate.[145] Courts had recognized the defense in the environmental,[146] healthcare,[147] and telecommunications fields.[148]

Regarding the Act's legislative history, the farmer also noted that Congressman Volstead stated in a House Report on the Bill that became the Act that "[t]he aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in *good faith* for the benefit of its members might avail themselves of the provisions of this bill."[149]

The defendant finally argued that refusing to acknowledge a good faith defense would turn Capper-Volstead into a trap for unwary farmers.[150] Such a construction would effectively make farmers guarantors of the cooperative and its members.[151]

Plaintiffs, on the other hand, argued that no good faith Capper-Volstead defense exists for several reasons. Plaintiffs first noted that the good faith defense

142. 15 U.S.C. § 17 (2012) (emphasis added).

143. Rose Acre Farms Post-Hearing Memo, *supra* note 138, at 6.

144. *Id*.

145. *See id*.

146. *See In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1160-61 (3d Cir. 1993); USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593, 634 (W.D. Pa. 2000).

147. Hosp. Bldg. Co. v. Trs. of Rex Hosp., 691 F.2d 678, 685 (4th Cir. 1982).

148. MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1138 (7th Cir. 1983).

149. H.R. REP. NO. 67-24, at 1 (1922) (emphasis added).

150. *See* Rose Acre Farms Post-Hearing Memo, *supra* note 138, at 6-7.

151. *See id*.

was expressly rejected by the *Mushroom* court.[152] The court in that case found that because section one of the Sherman Act does not involve intent, or state of mind, the good faith defense is irrelevant:

> The affirmative defenses of good faith reliance on counsel is generally warranted only where the offense alleged involves willful and unlawful specific intent . . . . Therefore, because a violation of the Sherman Act does not require proof of specific intent, advice of counsel would not be a proper defense to such related claims.[153]

Additionally, plaintiffs noted that the FTC had opined that "[t]he Supreme Court has held that 'good motives will not validate an otherwise anticompetitive practice.'"[154]

Second, plaintiffs argued that "bad intent"—presumably the opposite of good faith—is not an element of a Section One Sherman Act claim, therefore good faith is irrelevant. Plaintiffs claimed all that is required is knowingly engaging in conduct leading to anticompetitive effect.[155] Accordingly, because they were not required to prove specific intent, plaintiffs argued that no good faith defense existed as a matter of law.

Third, plaintiffs noted the existing presumption against creating new antitrust immunities found in federal law and argued that federal precedent required a narrow interpretation of proposed antitrust exemption and avoiding the finding of implied exemptions.[156]

Fourth, plaintiffs argued that the text and legislative history of the Capper-Volstead Act provided no support for an implied good faith defense and noted that

152. *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 391-92 (E.D. Pa. 2014).

153. *Id*.

154. *In re* N.C. Bd. of Dental Examiners, No. 9343, 2011 FTC LEXIS 290, at *79 (F.T.C. 2011) (stating, "Respondent's third defense is that it acted in 'good faith.' This is not a valid defense under the antitrust laws. The Supreme Court has held that 'good motives will not validate an otherwise anticompetitive practice.'"), *petition for review denied*, N.C. State of Board of Dental Examiners (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015).

155. United States v. U.S. Gypsum Co., 438 U.S. 422, 436 n.13 (1978) (holding that "intent" is only an element of a Sherman Act criminal cause of action); United States v. Patten, 226 U.S. 525, 543 (1913); Va. Vermiculite Ltd. v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998); United States v. Cont'l Grp., 603 F.2d 444, 461 (3d Cir. 1979); *see* The Package Shop v. Anheuser Bush, Inc., No. 83-513, 1984 U.S. Dist. LEXIS 24942, at *79 (N.J. 1984).

156. *See* Jefferson Cnty. Pharm. Ass'n v. Abbott Labs, 460 U.S. 150, 157-58 (1983); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); Grp. Life & Healthy Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); United States v. Borden Co., 308 U.S. 188, 198 (1962); Shaw v. Dallas Cowboys Football Club, 172 F.3d 299, 301 (3d Cir. 1999).

had Congress intended the Act to host a good faith defense, they could have put one in the text of the Act itself. Regarding the reference to "good faith" by Representative Volstead, plaintiffs argued that the reference suggested that the Act had broad coverage but did not intend to make subjective intent an element of a Capper-Volstead defense.[157]

Finally, plaintiffs argued that any implied antitrust exemptions purportedly found in other contexts—labor, telecommunications, climate change, and healthcare laws—did not mean that an exemption should be implied in the agricultural context. They argued that the labor/collective bargaining cases[158] focused on "reasonable foreseeability" and necessity at the time of the conduct, which it argued were both objective measures whereas "good faith" in the Capper-Volstead context was arguably a subjective concept.

The farmer disagreed and argued that the "good faith" standard is not an indeterminate subjective standard;[159] instead "good faith" simply means honesty in fact and reasonableness under the circumstances.[160] The farmer distinguished *Mushroom* by arguing the court simply found that a good faith *reliance on advice of counsel* defense was precluded because Section One of the Sherman Act does not require specific intent.[161] The *Mushroom* court never addressed the defendants' argument that the "good faith" affirmative defense is part and parcel of the Capper-Volstead Act exemption itself, stemming from the Act's enhancement of Section Six of the Clayton Act.[162] Thus, the farmer argued that the *Mushroom* court and the plaintiffs in the *Eggs* cases were looking at the wrong statute—they should have been interpreting the Capper-Volstead Act, not the Sherman Act.[163] Simply put, the farmer contended statutory policies and protections afforded labor and agriculture are the same under the Clayton Act—if a good faith defense is recognized in one area (labor), it should be recognized in the other (agriculture) as well.[164]

At oral argument on summary judgment, the farmer's counsel reiterated that

157. Rose Acre Farms Post-Hearing Memo, *supra* Note 140, at 6; *see also* Feather v. United Mine Workers, 711 F. 2d 530, 542-43 (3rd Cir. 1983).

158. *See generally Feather*, 711 F.2d at 530; Consol. Express, Inc. v. N.Y. Shipping Ass'n Inc., 602 F.2d 494 (3d Cir. 1979); Larry v. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368 (3d Cir. 1979), *cert. denied*, 459 U.S. 916 (1982).

159. Rose Acre Farms Post-Hearing Memo, *supra* note 138, at 5-6.

160. *Id.* at 5.

161. *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 391-92 (E.D. Pa. 2014).

162. *Id.*

163. *See* Rose Acre Farms Post-Hearing Memo, *supra* note 138, at 6-7.

164. *Id.* at 6.

the good faith defense is extremely important to individual farmers because without it, if even one member of a cooperative is not a farmer, "[p]oof, no exemption."[165] If that happens, then farmers in the cooperative "are automatically members of an illegal cartel. That can't be the law."[166] Counsel highlighted that plaintiffs' position would effectively require farmers to hire an auditor, such as PricewaterhouseCoopers[167], to investigate each cooperative member to ensure each meets the definition of a farmer under the Capper-Volstead Act on a continuing basis.[168]

This argument appeared to initially appeal to the court: "I think this is a very intriguing defense . . . I'm not saying it's not possible, no way, no how, not in this lifetime, but I am saying, don't we have to be kind of realistic here and see if this might be an opportunity for it . . . ."[169]

Defense counsel went on to argue that even though the term "good faith" only appears once in the text of Capper-Volstead Act, it still exists and need not be expressly stated multiple times.[170] He argued that "there's a lot of things that don't appear in the Capper-Volstead Act that are unquestionably protected conduct. Not a word in there about price or price fixing," which has been found to be fully protected conduct.[171] Similarly, he contended that the statute does not mention "buying, selling, storing, transporting, financing, et cetera," but those actions are legally protected as well.[172] The farmer's counsel asserted that "[t]here is no question that the Capper-Volstead Act, okay, was enacted to expand to clarify and expand the protections given to agriculture under Section Six. Six, the labor and antitrust exemptions come from the same mother, okay."[173] Counsel claimed, therefore, that the labor exemption cases were direct analogs to the agricultural antitrust good faith exemption for which he argued - they both came from the same mother statute - section six of the Clayton Act.[174]

Regarding the contours of the "good faith" Capper Volstead defense, should

165. Transcript of Oral Argument at 279, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Feb. 23, 2016) [hereinafter Processed Egg Prods. Transcript of Oral Arg.].

166. *Id*. at 280.

167. *See Services*, PRICEWATERHOUSECOOPER, www.pwc.com/us/en/services.html (last visited Apr. 21, 2017).

168. *See id*.

169. *Id*. at 286-87.

170. *Id*. at 287.

171. *Id*. at 289.

172. *Id*. at 290.

173. *Id*. at 292.

174. *Id*. at 293 (emphasis added).

the court agree it existed, the farmer's counsel argued that the labor exemption cases had employed a *reasonableness* standard and that the "same logic should lead to the creation of a reasonable farmer test to determine the validity and applicability of a good faith exemption [under] the Capper-Volstead."[175] Plaintiffs' counsel, on the other hand, argued that if adopted by the court, the "good faith" argument "would be a get-out-of-jail card essentially for any large, integrated agribusiness to conspire in a trade association to restrict supply and just say, '[w]ell, I had a good-faith belief we were a Capper-Volstead cooperative.'"[176] However, at the same time, even plaintiffs' counsel acknowledged the facial appeal of the farmer's argument: "It's a creative defense, I grant them that."[177] The Court probed the issue further:

> The Court: Okay. What about the argument [in the *Mushroom* case] focusing on a claim of a good-faith belief that there was no violation as opposed to a good-faith belief in embracing—having a claim to the exemption?
>
> [Plaintiffs' counsel]: Again, I fail to see the big difference there.
>
> The Court: But it was a good argument.
>
> [Plaintiffs' Counsel]: It was—I grant them. I said that. I think—created a good argument, nice try. I don't think it works.[178]

In concluding the hearing, the farmer's counsel argued that:

> [i]f an individual farmer cannot rely on the representations—reasonably rely on the representations made by a cooperative that a farmer wants to join, okay, cooperatives—the public policy underlying cooperatives encouraging their formation and encouraging their growth will be severely undermined. Farmers will be put in an untenable position of becoming guarantors of the legitimacy of their cooperative structure and their membership. How many times a year does a—does a member have to go out on the farm, as you said, of his fellow farmers to see how many cows he's got or does he have any cows. Or, you know, did he sell his farm in midyear. If he sells his farm, but he's not taken off the membership, oh, my God, it's a cartel. It's antitrust liability.[179]

175. *Id*. at 306.
176. *Id*. at 313.
177. *Id*.
178. *Id*. at 314.
179. *Id*. at 323-24.

In September 2016, the *Eggs* court issued an opinion disposing of the farmer's good faith Capper-Volstead affirmative defense.[180] The court stated that it was "not persuaded by the Defendant's argument as to the existence of a good faith exemption to the statute."[181] The court reemphasized that antitrust exemptions must be narrowly construed.[182]

Instead, the *Eggs* court adopted the *Mushroom* court's reasoning and expressly cited that the court's prior opinion that a section one Sherman Act violation does not require specific intent, precludes good faith as a proper defense.[183] Further, the *Eggs* court found that the defendant's attempt to distinguish between good faith reliance on advice of counsel *(Mushroom*) and good faith reliance on statements and conduct of the cooperative (*Eggs*) did not mandate a different conclusion—it is "largely a distinction without a difference."[184]

Similarly, the court rejected the argument that the good faith exemption is embedded in the Capper-Volstead Act and not the Sherman Act. The court reasoned, "[r]egardless of how it is tied up, however, what the defendants are ultimately asking the Court to do in both cases is to establish an implicit exemption to the Sherman Act."[185] The *Eggs* court found that the *Mushroom* court had already ruled on the issue—"good faith was *not* an inherent component of Capper-Volstead."[186] The court added that the farmer had provided no authority compelling a contrary conclusion.[187]

However, despite its ruling, the *Eggs* court recognized the difficult position faced by farmers under its reading of the law.[188] The court laid this burden at Congress' feet, stating that "[u]ntil Congress may be motivated to turn its attention to this gaping hole, diligent policing by co-operative members of the membership rules is the only available protection."[189]

IX. CONCLUSION

What about the reasonable farmer? How is he or she supposed to respond to

180. Memorandum at 25-27, *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-02002 (E.D. Pa. Sept. 28, 2016) [hereinafter Processed Egg Prods. Memorandum].

181. *Id*. at 25.

182. *Id*.

183. *Id*. at 26.

184. *Id*.

185. *Id*.

186. *Id*. at 27.

187. *Id*.

188. *Id*.

189. *Id*.

the decade of agricultural antitrust litigation discussed above? How many are even aware of this cratered litigation landscape?

As suggested by the *Eggs* court, laying the burden of embedding an express element of good faith in the Capper-Volstead Act itself at Congress' feet does little to help farmers and their cooperatives today.[190] Farmers have effectively become guarantors of their cooperative's Capper-Volstead status and compliance—perhaps without even realizing it. While one federal appellate court has acknowledged the issue is both serious and unsettled,[191] it will take years of expensive litigation and appeals before court opinions coalesce and provide anything close to a definitive answer. Lobbying Congress for reform, though, may not present a much more appetizing option and may not be any more expedient.

In the interim, cooperatives will undoubtedly increase diligence in policing their membership rolls. Some may consider requiring members to indemnify the cooperative and/or its members for any errors committed in the certification process. Some farmers may seek similar indemnifications from the cooperative in the event their cooperatives and co-members commit the same errors. However, given the sheer size of the damages claimed in these agricultural antitrust lawsuits, indemnification may be of little comfort—the size of potential liability may extinguish any solace indemnification might provide. Additionally, many cooperatives have few tangible assets in the first place to back up an indemnification agreement. Also, with joint and several liability, indemnification may do little to actually protect the indemnified.

Further, simply requiring compliance certification may not be enough. Cooperatives and their members may require background documents to confirm farmer status and substantiate claims of Capper-Volstead status. These documents should be verified and authenticated on a frequent basis. Cooperatives and farmers may also seek legal opinions or auditor statements confirming Capper-Volstead status. However, conservative lawyers, law firms, and auditors may hesitate to take on such projects. At the very least, they will undoubtedly limit the scope of their advice and opinions to well-defined discreet conduct and issues, excluding overarching status opinions. At some point, specialty insurers may see an opportunity to step in and provide some new type of Capper-Volstead-specific insurance. Undoubtedly, though, any such policies would be within well-defined parameters and would not be cheap.

Meanwhile, farmers are left trying to focus on producing agricultural products to sell in the open market—that is their livelihood after all. There is no doubt

190. *See id.*
191. *See id.*

that worrying about the Capper-Volstead compliance of their cooperatives and co-members will divert attention and resources from actual farming activities. It would also be naive to suggest that famers will simply have to estimate the costs attributable to these efforts and recover some of the costs from their customers through price increases. Competition in agricultural markets is steep, and profit margins are slim, except in the best of times. It is overly optimistic to think farmers can recover any of these costs—even if they could be quantified—through increased prices. Ironically, increased prices is what led to most of these agricultural antitrust lawsuits in the first place.