

# Agricultural Cooperative Antitrust Exemption- Fairdale Farms Inc. v. Yankee Milk Inc.

Alan M. Anderson

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Alan M. Anderson, *Agricultural Cooperative Antitrust Exemption-Fairdale Farms Inc. v. Yankee Milk Inc.*, 67 Cornell L. Rev. 396 (1982)  
Available at: <http://scholarship.law.cornell.edu/clr/vol67/iss2/7>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## RECENT DEVELOPMENTS

### THE AGRICULTURAL COOPERATIVE ANTITRUST EXEMPTION—*Fairdale Farms, Inc. v. Yankee Milk, Inc.*

Despite the seemingly pervasive reach of United States antitrust laws,<sup>1</sup> many sectors of the economy are exempt from their proscriptions.<sup>2</sup> Agricultural cooperatives,<sup>3</sup> in particular, have been exempt from

---

<sup>1</sup> The primary antitrust laws in the United States are the Sherman Act, 15 U.S.C. §§ 1-7 (1976), the Clayton Act as amended by the Robinson-Patman Act, *id.* §§ 12-27, 44, and § 5 of the Federal Trade Commission Act, *id.* § 45.

<sup>2</sup> Pogue, *Antitrust Exemptions—Introduction*, 33 ANTITRUST L.J. 1, 1 (1967) [hereinafter cited as *Antitrust Exemptions*]. Most sectors have received their exemption from Congress. Major league baseball is a notable exception, exempt as a result of Supreme Court decisions. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). More than 20% of the nation's private economic activity, extending to over 20 sectors, is affected by some antitrust exemption. Pogue, *The Rationale of Exemptions from Antitrust*, 19 A.B.A. ANTITRUST SECTION 313, 314 (1961). In creating antitrust exemptions, "Congress has used a great variety of legislative devices. . . . Some exempt certain types of agreements or specifically described transactions; some relate to the existence or operation of particular categories of organizations; others provide immunity to persons who perform certain acts." *Id.* at 313-14.

The rationales for antitrust exemptions are as varied as the methods for enacting them. Seven different justifications have been suggested: the disparity of economic power between persons in the particular category and their competitors, suppliers, or purchasers, *see, e.g., April v. National Cranberry Ass'n*, 168 F. Supp. 919, 921 (D. Mass. 1958); a policy of assisting American businesses in foreign competition, *see, e.g., Webb-Pomerene Act of 1918*, 15 U.S.C. §§ 61-65 (1976); a policy of encouraging certain desired results, *see, e.g., Robinson-Patman Act*, 15 U.S.C. §§ 13-13b, 21a (1976); the needs of national defense, *see, e.g., Defense Production Act of 1950*, 50 U.S.C. § 708(b) (repealed 1956); maintenance of favorable federal/state relations, *see, e.g., Parker v. Brown*, 317 U.S. 341, 350-51 (1942); a belief that certain activities require cooperation among competitors, *see, e.g., Toolson v. New York Yankees*, 346 U.S. 356 (1953); and an aversion to novel or abrupt application of the antitrust laws to activity long thought immune, *see, e.g., id.* *See generally Antitrust Exemptions, supra*, at 2-3. A national commission recently stated, however, that antitrust exemptions should be created only "where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose." I NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177 (1979) [hereinafter cited as 1979 REPORT]. Indeed, antitrust immunities have come under increasing scrutiny. *See U.S. DEP'T OF JUSTICE, REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES (1977)* [hereinafter cited as 1977 REPORT]. *See generally Myrter, Where Have All the Exemptions Gone? Like Old Soldiers, They Are Fading Away*, 46 ANTITRUST L.J. 940 (1978).

<sup>3</sup> A cooperative . . . is basically an association organized . . . for the purpose of marketing products produced . . . [by] its members, or purchasing supplies used by its members . . . . Characteristically, they are non-profit. Their objectives are to help their members obtain the best price for their products or effect important savings in the purchase of . . . supplies. Traditionally, these associations are rather closely run and controlled by their membership. . . . There is seldom any substantial amount of non-member capital invested in their operation. . . .

Noakes, *Exemption for Cooperatives*, 19 A.B.A. ANTITRUST SECTION 407, 409 (1961).

the antitrust laws for over sixty years.<sup>4</sup> The scope of the exemption remains unclear,<sup>5</sup> however, especially with regard to monopolization and attempts to monopolize in violation of the Sherman Act.<sup>6</sup>

In *Fairdale Farms, Inc. v. Yankee Milk, Inc.*,<sup>7</sup> the Court of Appeals for the Second Circuit held that agricultural cooperatives are not subject to the same test for unlawful monopolization as are corporations.<sup>8</sup> Rather, an agricultural cooperative is liable for unlawful monopolization only if it commits predatory acts.<sup>9</sup> The court's holding ignores numerous pro-

<sup>4</sup> The two principal statutory components of the agricultural cooperative exemption are § 6 of the Clayton Act, 15 U.S.C. § 17 (1976), and the Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1976).

Section six of the Clayton Act, originally enacted in 1914 (ch. 323, § 6, 38 Stat. 731), provides that

[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 purposes 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 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.

15 U.S.C. § 17 (1976). The Capper-Volstead Act, originally enacted in 1922 (ch. 57, §§ 1-2, 42 Stat. 388), provides in pertinent part:

§ 1: Persons engaged in the production of agricultural products as farmers, planters, ranchmen, [or] dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing . . . 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 or 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.

§ 2: If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve . . . a complaint [containing a notice] . . . requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . .

7 U.S.C. §§ 291-292 (1976); see notes 19-28 and accompanying text *infra*.

<sup>5</sup> "The law relative to agricultural cooperatives can be succinctly described by one word—*uncertainty*." Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 103 (1963) (emphasis in original).

<sup>6</sup> 15 U.S.C. § 2 (1976). One commentator has described this area of the agricultural cooperative exemption as an "uncharted sea." Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 83 (1958).

<sup>7</sup> 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981).

<sup>8</sup> *Id.* at 1038-39, 1045; see notes 55 & 61 and accompanying text *infra*.

<sup>9</sup> See 635 F.2d at 1044-45. On predatory pricing, see generally Brodley & Hay, *Predatory*

nouncements to the effect that agricultural cooperatives, once formed, are to be treated as corporations, and casts aside a longstanding judicial practice of narrowly interpreting the agricultural cooperative antitrust exemption.

## I

THE DEVELOPMENT OF THE AGRICULTURAL COOPERATIVE  
ANTITRUST EXEMPTION

Agricultural cooperatives developed relatively recently in American agriculture. Before the 1870s, farmers generally operated as individual units, competing with each other to market their products.<sup>10</sup> By the 1870s, the Grange movement had popularized cooperative marketing of produce, and after 1890, cooperatives became a firmly established part of agriculture.<sup>11</sup>

The movement to enact a federal antitrust law during this period raised fears among farm groups that agricultural cooperatives would be included within its reach.<sup>12</sup> In fact, during debate on the Sherman Act, Congress considered but did not approve a partial exemption for agricultural cooperatives.<sup>13</sup> Subsequently, however, the Supreme Court

*Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981).

<sup>10</sup> Mischler, *Agricultural Cooperative Law*, 30 ROCKY MTN. L. REV. 381, 381 (1958); Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 341 (1975). Indeed, "early-twentieth-century American farming epitomized the pure competition model." *Id.* at 352.

<sup>11</sup> Mischler, *supra* note 10, at 381-82. By the early 1920s there were more than 12,000 marketing associations and approximately 2,100 farm supply associations. *Id.* For a general discussion of the growth of agricultural cooperatives, see Hanna, *Antitrust Immunities of Cooperative Associations*, 13 LAW & CONTEMP. PROBS. 488, 488-92 (1948).

The early growth of agricultural cooperatives was hampered because many state courts held that cooperatives were illegal restraints on trade. *See, e.g.*, *Georgia Fruit Exch. v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913); *Burns v. Wray Farmers' Grain Co.*, 65 Colo. 425, 176 P. 287 (1918); *Reeves v. Decorah Farmers' Co-op. Soc'y*, 160 Iowa 194, 140 N.W. 844 (1913). *Contra*, *Burley Tobacco Soc'y v. Gillaspay*, 51 Ind. App. 583, 100 N.E. 89 (1912); *Bullville Milk Producers' Ass'n v. Armstrong*, 108 Misc. 583, 178 N.Y.S. 612 (Sup. Ct. 1919). *See generally* FARMERS COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, LEGAL PHASES OF FARMER COOPERATIVES 265-75 (1977) [hereinafter cited as LEGAL PHASES]. As states began to pass their own antitrust statutes, however, they provided exemptions for agricultural cooperatives. *See, e.g.*, 1896 Ga. Laws 68 (1896); 1893 Ill. Laws 182 (1893). *See generally* LEGAL PHASES, *supra*, at 268-69.

The Supreme Court slowed the enactment of state antitrust exemptions for agricultural cooperatives by holding that the grant of such an exemption was an unreasonable classification in violation of the equal protection clause of the fourteenth amendment, because agricultural producers were allowed to combine and otherwise restrain trade whereas ordinary businesses were not. *See Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 556-57 (1902). States, however, continued to adopt such exemptions. *See, e.g.*, 1913 Colo. Sess. Laws 613 (1913); 1906 Ky. Acts 429 (1906). *See generally* Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 432 (1952). The Supreme Court eventually overruled *Connolly* in *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

<sup>12</sup> Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 36 (1960).

<sup>13</sup> The proposed amendment read as follows: "Provided, That this act shall not be con-

suggested that agricultural cooperatives would fall within the purview of the Sherman Act.<sup>14</sup>

Nevertheless, the period between 1899 and 1919 was a "golden era" in agriculture.<sup>15</sup> In 1914, Congress enacted a limited agricultural cooperative exemption in section six of the Clayton Act.<sup>16</sup> The end of a period of relative prosperity, unresolved legal questions, and a growing awareness of the need for agricultural cooperatives led to the passage of a broader exemption in the Capper-Volstead Act in 1922.<sup>17</sup> The current agricultural cooperative antitrust exemption is based upon these provisions, as well as their subsequent judicial development.<sup>18</sup>

### A. *The Statutory Bases of the Exemption*

The main purpose of section six of the Clayton Act<sup>19</sup> was not agricultural reform; Congress was more concerned with enabling labor unions to develop unfettered by antitrust sanctions.<sup>20</sup> The scant legislative

strued to apply to . . . any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products." 21 CONG. REC. 2611 (1890).

The proposal is significant because its aim was to amend § 1 of the Sherman Act, which outlawed only agreements, arrangements, and combinations. *See id.* at 2598. Moreover, the proposed amendment made no attempt to exempt agricultural cooperatives from the antimonopoly provisions of the Sherman Act. It did not appear in the final version of the Sherman Act. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (1890). Thus, it was contemplated even at this early date that although cooperatives would be free to form, they would not be at liberty to monopolize.

<sup>14</sup> *See* *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908) ("The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers . . . from the operation of the [Sherman] Act and that all these efforts failed, so that the act remained as we have it before us.") (dictum).

<sup>15</sup> W. GEE, *THE SOCIAL ECONOMICS OF AGRICULTURE* 72-73 (3d ed. 1954).

<sup>16</sup> Ch. 323, § 6, 38 Stat. 731 (1914); *see* note 4 *supra*; notes 19-22 & 68-70 and accompanying text *infra*.

<sup>17</sup> Ch. 57, §§ 1-2, 42 Stat. 388 (1922); *see* note 4 *supra*; notes 24-28 & 71-74 and accompanying text *infra*.

<sup>18</sup> Noakes, *Antitrust Exemptions: Agricultural Cooperatives*, 33 ANTITRUST L.J. 7, 7 (1967). Other statutes elaborate upon the basic provisions of these two acts. *See, e.g.*, Cooperative Marketing Act of 1926, 7 U.S.C. § 455 (1976) (providing that agricultural cooperatives may legally acquire and exchange pricing, production, and marketing data); Agricultural Adjustment Act of 1933, 7 U.S.C. §§ 601-604, 607-623 (1976) (empowering the Secretary of Agriculture to enter into marketing agreements with associations of producers); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (1976) (permitting agricultural cooperatives to return net earnings and surplus to their members, producers, and consumers in proportion to their purchases or sales).

<sup>19</sup> *See* note 4 *supra*.

<sup>20</sup> *See* Note, *supra* note 10, at 354 (suggesting that Congress enacted § 6 based on the labor component in agriculture, unaware of the implications of the exemption for agricultural cooperatives). *See generally* 51 CONG. REC. 11163, 11673, 11845, 12130 (1914). Because the labor component of agriculture has been replaced to a large extent by machinery, "[t]he fundamental premise of section 6 does not retain its vitality today." Note, *supra* note 10, at 355. Moreover, "[i]f the literal words of section 6's strongest proponents are to be heeded ['the only organizations which should be excluded from the operation of the antitrust laws are

history concerning the agricultural cooperative provision in section six indicates that Congress itself was unsure of the scope of its enactment.<sup>21</sup> It does appear, however, that Congress did not intend to remove agricultural cooperatives completely from the reach of the antitrust laws.<sup>22</sup>

This limited exemption proved insufficient. Section six failed to elucidate those activities in which agricultural cooperatives could legitimately engage<sup>23</sup> and made no provision to protect cooperatives with capital stock. The inadequacy of the statute, coupled with the decline in farm prices after World War I and increased use of the cooperative form, prompted demands in the early 1920s that Congress broaden the scope of the exemption.<sup>24</sup>

These pressures resulted in the passage of the Capper-Volstead Act of 1922.<sup>25</sup> Hailed as agriculture's "Magna Carta,"<sup>26</sup> the Capper-Volstead Act sought to clarify the scope of activities that agricultural cooperatives could undertake.<sup>27</sup> Unfortunately, the legislative history of the Capper-Volstead Act, like that of section six of the Clayton Act, is a confusing combination of contradictory statements and reports.<sup>28</sup>

those where labor is the basis. . . .'], the basis of the exemption has dissolved." *Id.* (quoting S. REP. NO. 698, 63d Cong., 2d Sess. 46 (1914) (footnote omitted)).

<sup>21</sup> Saunders, *supra* note 12, at 37-40. During the debate on § 6, Representative Volstead remarked how "very unfortunate" it was that § 6 was being written without "anybody [knowing] definitely just what it means. . . . We ought to know what we are voting for." 51 CONG. REC. 9564 (1914). The statements of several Congressmen reveal this confusion. *See id.* at 9545 (remarks of Rep. MacDonald); *id.* at 9456 (remarks of Rep. Quinn); Saunders, *supra* note 12, at 38-39.

<sup>22</sup> *See* 51 CONG. REC. at 9567 (remarks of Rep. Webb: "Now, I will say frankly to my friend that we never intended to make any organizations, regardless of what they might do, exempt in every respect from the [antitrust] law.>").

<sup>23</sup> 15 U.S.C. § 17 (1976).

<sup>24</sup> 1977 REPORT, *supra* note 2, at 10; Note, *supra* note 6, at 64; Note, *supra* note 10, at 356.

<sup>25</sup> *See* note 4 *supra*. Both Houses of Congress had passed earlier versions (in 1919), but conferees could not agree on whether the Secretary of Agriculture or the Federal Trade Commission would have enforcement jurisdiction under the antiprice enhancement section (section two) of the proposed legislation. They also failed to concur on whether the law would include a proviso prohibiting monopolization. *See Hearings on S. 4344 Before a Subcomm. of the Senate Comm. on the Judiciary*, 66th Cong., 2d Sess. (1920).

<sup>26</sup> *Allen Bradley Co. v. Local Union*, 325 U.S. 797, 804 (1945).

<sup>27</sup> Note, *supra* note 6, at 65.

<sup>28</sup> *Compare* H.R. REP. NO. 24, 67th Cong., 1st Sess. 3 (1921) ("In the event that [cooperatives] authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law. . . .") with 62 CONG. REC. 2050 (1921) (remarks of Sen. Kellogg:

We found that the individual manufacturer and merchant was not in a position to place his products in foreign markets without cooperation with other producers . . . so that in the interest of the trade and commerce of this country it was proper to allow them to combine into selling agencies . . .

[T]he farmer is in very much the same position. . . . His means and his opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer . . .).

### B. *Judicial Interpretations of the Exemption*

Several courts have acknowledged the limitations of the agricultural cooperative exemption and often have endowed agricultural cooperatives with rights and responsibilities similar to those of business corporations.<sup>29</sup> Litigation involving the agricultural cooperative exemption is rare, however, and most of the relevant cases are of recent vintage.<sup>30</sup> The Supreme Court has construed the exemption,<sup>31</sup> and lower courts have applied the resultant distinction between two types of agricultural cooperative activity: activities "below" the cooperative level, which are exempt from the antitrust laws, and activities "on" the cooperative level, which are not exempt.<sup>32</sup>

Activities "below" the cooperative level include marketing agreements between farmers and cooperatives and joint marketing contracts among affiliated cooperatives. Thus, in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*,<sup>33</sup> the Supreme Court had to decide whether an agreement in restraint of trade between legally distinct cooperatives is forbidden under sections one and two of the Sherman Act.<sup>34</sup> The Court ruled that if the cooperatives function as a single enterprise and the legal distinctions between them are of minimal operational importance, such inter-enterprise conspiracies are exempt from liability under the antitrust laws.<sup>35</sup>

---

<sup>29</sup> 1977 REPORT, *supra* note 2, at 11; see *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960) ("[T]he general philosophy of [the Clayton and Capper-Volstead Acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities.")

<sup>30</sup> One possible explanation is that until 1929, the Department of Justice lacked sufficient funds to bring such actions because of provisions in the appropriation bills providing that "no part of this appropriation shall be expended for the prosecution of [farmers] and associations of farmers who cooperate and organize . . . to obtain and maintain a fair and reasonable price for their products." See, e.g., Act of Feb. 24, 1927, ch. 189, 44 Stat. 1194; Act of June 23, 1913, ch. 3, 38 Stat. 53.

During the period in which only § 6 of the Clayton Act was in effect, only one case interpreted its scope. In *United States v. King*, 250 F. 908 (D. Mass. 1916), an association of potato shippers accused of restraining trade sought unsuccessfully to gain immunity under § 6. The court, holding that the association did not qualify as a cooperative, stated in dictum that § 6 meant "that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations." 250 F. at 910.

<sup>31</sup> See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Borden*, 308 U.S. 188 (1939). See generally notes 32-45 and accompanying text *infra*.

<sup>32</sup> See Note, *supra* note 10, at 368.

<sup>33</sup> 370 U.S. 19 (1962).

<sup>34</sup> *Id.* at 28-29.

<sup>35</sup> *Id.* See also *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974) (conspiracy between two potato grower bargaining associations to restrain trade in marketing potatoes exempt activity); *United States v.*

Courts have struck down two types of activities that may be characterized as "on" the cooperative level. In *United States v. Borden*,<sup>36</sup> the Supreme Court held that anticompetitive arrangements and agreements between agricultural cooperatives and non-cooperative entities, activities "on" the cooperative level,<sup>37</sup> violate section one of the Sherman Act.<sup>38</sup> In addition, the Court determined that the Capper-Volstead Act does not condone combinations involving non-farmers.<sup>39</sup>

The second type of nonexempt conduct on the cooperative level involves the use of coercive or predatory practices.<sup>40</sup> In *Maryland & Virginia Milk Producers Association v. United States*,<sup>41</sup> the government brought a civil action against an agricultural marketing association consisting of 2,000 dairy farmers, a group that accounted for 86% of the milk

Maryland Coop. Milk Producers, Inc., 145 F. Supp. 151 (D.D.C. 1956) (conspiracy between two dairy cooperatives to fix milk prices exempt activity).

<sup>36</sup> 308 U.S. 188 (1939). *Borden* was the first case concerning the agricultural cooperative antitrust exemption to reach the Supreme Court.

<sup>37</sup> Note, *supra* note 10, at 368.

<sup>38</sup> 308 U.S. at 199-203. The case involved a conspiracy among milk distributors, labor unions, a trade association, government officials, and agricultural cooperatives to maintain the price of milk at artificially high levels in the Chicago milk market.

<sup>39</sup> The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.

*Id.* at 204-05. The prohibition extends to combinations with other cooperatives, which have non-"farmer" members, as the term was understood in 1922. See *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978).

The Court also interpreted § 2 of the Capper-Volstead Act. The cooperative had claimed that no prosecution could be brought until the Secretary of Agriculture took action. See note 4 *supra*. The Court held that the powers given to the Secretary of Agriculture did not preclude other administrative review of litigation but were only auxiliary powers:

But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.

308 U.S. at 206. No proceeding has ever been commenced under § 2 of the Act against a cooperative for undue price-enhancement. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1634 (1980).

<sup>40</sup> Note, *supra* note 10, at 371.

<sup>41</sup> 362 U.S. 458 (1960). *Maryland & Virginia* represents the culmination of a 12 year struggle between the government and the cooperative. The Justice Department commenced an action in 1948, but it was dismissed. On appeal, the Supreme Court remanded the case without comment. *United States v. Maryland & Va. Milk Producers Ass'n*, 335 U.S. 802 (1948). The circuit court found the cooperative guilty, 179 F.2d 426 (D.C. Cir. 1949), and the Court denied certiorari, 338 U.S. 831 (1949). In 1950, the Justice Department brought a successful suit alleging a price-fixing conspiracy. *United States v. Maryland & Va. Milk Producers Ass'n*, 193 F.2d 907 (D.C. Cir. 1951). A third suit was instituted in 1956. *United States v. Maryland Coop. Milk Producers*, 145 F. Supp. 151 (D.D.C. 1956). Two years later the government filed an omnibus complaint, which was the forerunner of the 1960 Supreme Court case.

purchased by milk dealers in the Washington, D.C. area.<sup>42</sup> The government charged the cooperative with violating sections two and three of the Sherman Act and section seven of the Clayton Act.<sup>43</sup> The evidence indicated that the cooperative association had tried to enhance its market position by interfering with non-members' milk shipments, attempting to foreclose the only market available to non-members, and coercing competing dairies to obtain their milk from member producers.<sup>44</sup> The Supreme Court held that these anticompetitive activities were "so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act. . . ."<sup>45</sup> Courts subsequently have held that cooperatives violate section two by engaging in boycotts and concerted refusals to deal,<sup>46</sup> unilateral refusals to sell,<sup>47</sup> and various other predatory acts.<sup>48</sup> Until recently, however, no

<sup>42</sup> 362 U.S. at 460.

<sup>43</sup> *Id.* at 460-61. The government also had charged the cooperative association with monopolizing and attempting to monopolize commerce in fluid milk in violation of § 2 of the Sherman Act. Relying on *Borden*, the district court had dismissed this charge on the ground that the government had failed to show joint activities with non-agricultural entities. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 45, 52 (D.D.C. 1958), *aff'd in part and rev'd in part*, 362 U.S. 458 (1960). The Supreme Court reversed on this issue, holding that *Borden* did not preclude § 2 actions against agricultural cooperatives. 362 U.S. at 462-63; see note 45 and accompanying text *infra*.

<sup>44</sup> 362 U.S. at 468.

<sup>45</sup> *Id.* The Court stated that although it was not confronted with charges under § 2 of the Sherman Act in *Borden*,

we do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act, while making them responsible for such practices as violations of the antitrust-restraint provisions of §§ 1 and 3 of that Act.

*Id.* at 463.

<sup>46</sup> See, e.g., *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 388 F.2d 789 (3d Cir. 1967); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967).

<sup>47</sup> See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1, 15-18 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962).

<sup>48</sup> See, e.g., *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 451 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967) (interference with supply contracts between processors and nonaffiliated producers and "restrictive tying contracts"); *North Tex. Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 193-96 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966) (predatory exercise of monopoly power); *Marketing Assistance Plan, Inc. v. Associated Milk Prods., Inc.*, 338 F. Supp. 1019, 1023 (S.D. Tex. 1972) (unreasonably restrictive membership and marketing agreements); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 486-88 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966) (discriminatory pricing).

Courts have not, however, always defined "predatory" consistently. The Supreme Court has stated that an agricultural cooperative must not "achieve monopoly by preying on independent producers." *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 467 (1960). The Tenth Circuit has remarked that "[t]he term [predatory] probably does not have a well-defined meaning in the context it was used, but it certainly bears a sinister connotation." *Telex Corp. v. International Business Machs. Corp.*, 510 F.2d 894, 927 (10th Cir. 1975). Professor Sullivan has observed:

court had determined whether agricultural cooperatives are liable under section two of the Sherman Act in the absence of evidence of predatory behavior.

## II

### *FAIRDALE FARMS, INC. v. YANKEE MILK, INC.*

The Second Circuit reached this issue in *Fairdale Farms, Inc. v. Yankee Milk, Inc.*<sup>49</sup> Yankee Milk and six other regional cooperatives formed Regional Cooperative Marketing Agency, Inc. (RCMA) in 1973 to fix milk prices.<sup>50</sup> Fairdale Farms objected to paying the prices fixed by RCMA, which generally were higher than the minimum prices set by the federal government,<sup>51</sup> and brought suit against Yankee Milk and RCMA in 1976 charging the defendants with price-fixing, monopolizing, and attempting to monopolize.<sup>52</sup> The district court dismissed the price-fixing charge and upheld the monopolization charge for trial,<sup>53</sup> relying on the test established by the Supreme Court in *United States v.*

Predatory business conduct can be defined as conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively. The earliest cases labeled predatory conduct as a violation of Section 2 when it was used to gain or hold monopoly power; the predatory monopolist became a figure in the National demonology.

There has been much talk about predatory behavior, but few efforts to analyze it. Businessmen and judges think they know it when they see it. Economists tend to doubt that it occurs, at least very often, because it is likely to cost the firm using it more than can be gained from it.

.....

[T]here will be something odd, something jarring or unnatural seeming about it. It will not strike the informed observer as normal business conduct, as honestly industrial.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 236, at 108-12 (1977) (footnotes omitted).

Conversely, as a district court has recently noted, "[t]here is a trend toward stretching the word predatory so as to let it include less pejorative conduct; for instance, conduct may be classified predatory if it evidences an intent unnecessarily; unreasonably; or illegally; to exclude a competitor from a market." *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 631 n.31 (M.D. Ga. 1981) (citations omitted).

<sup>49</sup> 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981).

<sup>50</sup> *Id.* at 1038-39. Yankee Milk and the other regional cooperatives had decided that the minimum dairy prices set by the United States for the Northcast were not providing an adequate return to farmers. *Id.* at 1038.

<sup>51</sup> The government is authorized by the Agriculture Marketing Agreements Act of 1937, 7 U.S.C. § 608c(s) (1976), to set minimum daily prices.

<sup>52</sup> 635 F.2d at 1039. Defendants invoked the Capper-Volstead Act as an affirmative defense to both charges. *Id.*

<sup>53</sup> *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,120 (D. Vt. Nov. 2, 1979), *aff'd in part and rev'd in part*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981). In upholding the monopoly charge, the district court stated that "a plaintiff claiming an agricultural cooperative has violated section 2 [of the Sherman Act] has no greater burden than if he sued a corporation." *Id.* at 77,117.

*Grinnell Corp.*<sup>54</sup> The *Grinnell* test provides:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>55</sup>

The Second Circuit, although affirming the district court's dismissal of the price-fixing charge,<sup>56</sup> disagreed with the district court's application of *Grinnell* and ordered the district court to dismiss the section two charge unless on remand Fairdale Farms could show predatory acts committed by Yankee Milk.<sup>57</sup>

The Second Circuit's analysis of the monopolization charge was based on the premise that an inherent conflict exists between section two of the Sherman Act and the Capper-Volstead Act.<sup>58</sup> After considering the history of agricultural cooperatives and pertinent statutory provisions, the court concluded that "agricultural cooperatives were 'a favorite child of Congressional policy.'" <sup>59</sup> The court then considered cases that have held agricultural cooperatives guilty of predatory acts and unlawful monopolization.<sup>60</sup> The Second Circuit concluded from these cases that the district court had applied an inappropriate test for monopolization,<sup>61</sup> and that agricultural cooperatives violate section two of

<sup>54</sup> 384 U.S. 563 (1966).

<sup>55</sup> *Id.* at 570-71.

<sup>56</sup> 635 F.2d at 1040-45. The Second Circuit properly affirmed the dismissal of the price-fixing charge in light of the legislative history and judicial interpretations of the Capper-Volstead Act. See note 29 and accompanying text *supra*; note 67 and accompanying text *infra*. See also *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 630 (M.D. Ga. 1981); *Hiat Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 504 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *North Cal. Supermarkets v. Central Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 989-94 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (*per curiam*), *cert. denied*, 439 U.S. 1090 (1979).

<sup>57</sup> 635 F.2d at 1045.

<sup>58</sup> *Id.* at 1040. The Second Circuit also stated that the district court had "[d]isregard[ed] the fundamental differences between a cooperative and a corporation." *Id.* Yet both Yankee Milk and RCMA were corporations. *Id.* at 1038-39.

<sup>59</sup> *Id.* at 1043 (quoting 5 H. TOULMIN, ANTI-TRUST LAWS OF THE UNITED STATES § 6.1, at 334 (1950)).

<sup>60</sup> 635 F.2d at 1043-44; see *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 423-24 (2d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973) (discriminatory pricing); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 388 F.2d 789, 797 (3d Cir. 1967) (picketing and harassment); *North Tex. Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 195-96 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966) (boycotts); *Gulf Coast Shrimpers & Oystermans Ass'n v. United States*, 236 F.2d 658, 665 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956) (coerced membership).

<sup>61</sup> Section two monopolization law is in disarray, primarily because of two competing theories regarding the nature of the offense: the power theory and the abuse theory. *Grinnell* represents the power theory, under which the existence of monopoly power is the essence of the offense. Accordingly, a defendant is liable under *Grinnell* if it possesses monopoly power; liability is avoided only with proof that the defendant inadvertently acquired its monopoly

the Sherman Act only if they engage in predatory acts.<sup>62</sup>

The court based this result on the conclusion that the Capper-Volstead Act immunizes agricultural cooperatives from the full application of the second element of the *Grinnell* test.<sup>63</sup> The court apparently assumed that the formation and growth of agricultural cooperatives inevitably involve the willful acquisition of power, and therefore that Capper-Volstead protection was directed toward such activity.<sup>64</sup>

### III ANALYSIS

Three factors militate strongly against the Second Circuit's treatment of the agricultural cooperative antitrust exemption. First, the legislative history of the exemption does not suggest that Congress had any intention to allow cooperatives to monopolize, but rather that the legislators' purpose was to allow only the unimpeded formation of agricultural cooperatives. Second, judicial interpretation of the Capper-Volstead Act lends support to this narrow construction of the exemption, rather than to the Second Circuit's distinction between agricultural

---

position. *See, e.g.*, *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam). In contrast, the abuse theory regards the abuse of monopoly as the essence of the offense. The defendant is liable if it wrongly acquired or abused its monopoly power. *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956). *See generally* Note, *Monopolization Under Section 2 of the Sherman Act*, 22 S.C.L. REV. 344, 350-73 (1970). "[C]ourts have oscillated between the two extremes in applying [section two of] the [Sherman] Act." *Id.* at 345.

<sup>62</sup> 635 F.2d at 1045. The Second Circuit remanded because it was not clear whether the district court had denied the defendants' § 2 motion for summary judgment on the ground that predatory acts had been shown or on the premise that the plaintiff would only have to meet the *Grinnell* monopolization test. *Id.*

<sup>63</sup> *Id.* at 1045. Since *Fairdale Farms*, two courts have followed the Second Circuit's holding that cooperatives are not subject to the same test for unlawful monopolization as are business corporations. In *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981), a dairy processor brought a civil antitrust action against a milk marketing association, alleging that the association had attempted to monopolize the supply of raw milk in Georgia. *Id.* at 611-12, 624. The court unquestioningly followed *Fairdale Farms* and required a showing of predatory acts on the part of the marketing association to establish a § 2 violation. *Id.* at 631-32. The defendant, however, did not monopolize, even under the *Grinnell* test. *See id.* at 643 ("[E]ven if Capper-Volstead did not apply, [the defendant] did not monopolize, lacking monopoly power in the relevant geographic market . . .").

In *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711 (N.D. Cal. 1981), agricultural cooperatives allegedly conspired to monopolize tomato canning and tomato products. *Id.* at 713. The court, following *Fairdale Farms*, failed to undertake an independent analysis of the exemption and its interpretation. *See id.* at 714-15. The court erroneously cited *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962), a case dealing with activities "below" the cooperative level, in support of its proposition that (absent predatory acts) cooperatives could monopolize—activity "on" the cooperative level. 511 F. Supp. at 715; *see* notes 32-35 and accompanying text *supra*. The Sixth Circuit recently rejected the *Fairdale Farms* standard in the analogous context of an attempt to monopolize charge. *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981) (per curiam); *see* notes 87-90 and accompanying text *infra*.

<sup>64</sup> 635 F.2d at 1045.

cooperatives and corporations under section two of the Sherman Act. Third, the current status of agricultural cooperatives in the economy suggests that after formation, they should be treated no differently under the antitrust laws from corporations.

### A. *Legislative History*

The legislative history of the agricultural cooperative exemption reflects no congressional intent to allow cooperatives to monopolize.<sup>65</sup> Although the *Fairdale Farms* court posited that "Capper-Volstead gives farmers the right to combine into cooperative monopolies,"<sup>66</sup> the remarks of one of the sponsors of the Act suggests only an intent to allow the formation of agricultural cooperatives.<sup>67</sup>

The language of the statutory provisions supports this interpretation of Congress's intent. Section six of the Clayton Act states that the antitrust laws shall neither forbid the "existence and operation" of non-profit agricultural organizations without capital stock, nor forbid such organizations from carrying out their legitimate objectives.<sup>68</sup> In addition, such organizations are not to be held illegal combinations or con-

<sup>65</sup> "The legislative history of Capper-Volstead exudes disapproval of monopoly and monopolistic practices." Note, *supra* note 10, at 375.

<sup>66</sup> 635 F.2d at 1040.

<sup>67</sup> [The bill] aims to authorize cooperative associations among farmers for the purpose of marketing their products. . . .

The objection made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. . . . The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns. It is objected in some quarters that this repeals the Sherman Antitrust Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combinations may or may not monopolize or restrain trade.

61 CONG. REC. 1033 (1921) (remarks of Rep. Volstead). See also H.R. REP. NO. 24, 67th Cong., 1st Sess. 3 (1921) ("In the event that [cooperatives] authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law. . . ."); 62 CONG. REC. 2057 (1922) (The purpose of the Capper-Volstead Act is "to give to the farmer the same right to bargain collectively that is already enjoyed by corporations.") (remarks of Sen. Capper).

<sup>68</sup> 15 U.S.C. § 17 (1976). The language in § 6 (and in the Capper-Volstead Act) is not framed in the unequivocal terms of antitrust immunity that Congress has used in other exemptions. See, e.g., Shipping Act of 1916, 46 U.S.C. § 814 (1976) (amended 1980) ("Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of the [Sherman] Act, and amendments and Acts supplementary thereto . . ."); Act of May 26, 1938, 15 U.S.C. § 13c (1976) ("Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, [and other educational or charitable] institutions not operated for profit."); Federal Aviation Act, 49 U.S.C. § 1384 (Supp. 1979) ("[T]he board may . . . exempt any person affected by such order from the operations of the 'anti-trust laws' . . .").

spiracies in restraint of trade.<sup>69</sup> Congress appears to have intended section six simply to give agricultural cooperatives the legal right to exist and operate.<sup>70</sup>

Congress's economic justification for the Capper-Volstead Act was its belief that, in the antitrust context, agriculture is distinct from ordinary businesses.<sup>71</sup> Section one of the Act therefore provides that farmers may associate in corporate or noncorporate form, with or without capital stock, for the purposes of processing, preparing, handling, and marketing the products of their members or persons engaged in agriculture.<sup>72</sup> Agricultural cooperatives may employ common marketing agencies and make "necessary contracts and agreements" to carry out such activities, provided they meet certain organizational requirements set forth in the statute.<sup>73</sup> Congress apparently intended these permitted activities to guarantee farmers the right to form agricultural cooperatives, but once formed, they were to be treated the same as other business corporations under the antitrust laws.<sup>74</sup>

<sup>69</sup> 15 U.S.C. § 17 (1976); see note 4 *supra*. The *Fairdale Farms* court ignored the impact of § 6 of the Clayton Act on agricultural cooperatives. See 635 F.2d at 1041.

<sup>70</sup> "[A]ll doubt should be removed as to the legality of the existence and operations of these organizations. . . ." H.R. REP. NO. 627, 63d Cong., 2d Sess. 16 (1913); S. REP. NO. 698, 63d Cong., 2d Sess. 10 (1913).

Some commentators suggest Congress designed § 6 to prevent the application of the *per se* rules of antitrust law to agricultural cooperatives, see Hufstедler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 AD. L. REV. 455, 458 (1970), and mandated the application of the rule of reason in determining whether cooperatives are unlawful. Saunders, *supra* note 12, at 36.

<sup>71</sup> Note, *supra* note 10, at 357-59 (arguing that this premise is subject to challenge today because of the structural changes that have occurred in agriculture since the 1920s).

<sup>72</sup> 7 U.S.C. § 291 (1976); see note 4 *supra*. The value of members' products in which the cooperative deals must exceed the value of nonmembers' products. 7 U.S.C. § 291 (1976).

<sup>73</sup> 7 U.S.C. § 291 (1976). One commentator describes the nature of the exemption in the following example:

Assume . . . that separate producers of oranges throughout a large orange growing region were to market their own output and were to meet together each season as independent producers to agree upon the price they would accept for oranges of different grades. That conduct, on its face, would be a *per se* violation of the antitrust laws. Suppose, now, that instead of agreeing on price directly the producers organize a cooperative to which they supply their oranges and which sets the price for and sells the oranges; that conduct is exempt.

L. SULLIVAN, *supra* note 48, § 236, at 721 (footnotes omitted).

<sup>74</sup> H.R. REP. NO. 24, 67th Cong., 1st Sess. 3 (1921) ("In the event that [cooperatives] authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law. . . ."); 1979 REPORT, *supra* note 2, at 256 ("Capper-Volstead cooperatives, once formed, are to be treated like business corporations under the antitrust laws."); see 62 CONG. REC. 2057 (1922) (remarks of Sen. Capper: The purpose of the Act is "to give the farmer the same right to bargain collectively that is already enjoyed by corporations."); 61 CONG. REC. 1033 (1921) (remarks of Rep. Volstead: "It is objected in some quarters that this [Act] repeals the Sherman Antitrust Act as to farmers. That is not true anymore than it is true that a combination of two or three corporations violates the act. Such combinations may or may not monopolize or restrain trade."). See also Noakes, *supra* note 18, at 11 ("The Clayton and

Because the Senate considered and rejected an amendment to the Act<sup>75</sup> that would have declared explicitly that cooperatives were not authorized to create monopolies, commentators have argued that Congress intended cooperatives not to be held liable under section two of the Sherman Act.<sup>76</sup> Congress's reasons for rejecting the amendment, however, do not support such a conclusion. The main proponent of the amended version of the bill proposed by the Judiciary Committee stated that it was "our purpose to relieve these associations from all possible risk of being prosecuted under section 1 of the [Sherman] Act, but not under section 2."<sup>77</sup> Many Senators voiced their opposition to the amended version because they feared courts might interpret violations of section two of the Sherman Act as also being violations of section one, thereby "render[ing] nugatory the purposes intended to be attained by the original bill."<sup>78</sup> In addition, several Senators argued that it was im-

---

Capper-Volstead Acts did not—singly or together—create an absolute antitrust immunity for cooperatives. At best, they expressed a policy of Congress to permit, without legal harassment, the formation and operation of cooperative associations of farmers.”).

The *Fairdale Farms* court engaged in almost no review of the legislative history of the Capper-Volstead Act. See 635 F.2d at 1042-43. Yet the court still concluded that Congress “did not intend to prohibit the voluntary and natural growth that agricultural cooperatives needed to accomplish their assigned purpose of effective farmer representation.” *Id.* at 1043. This conclusion was based primarily on Congress’s rejection of an amendment to the Capper-Volstead Act that would have prohibited cooperative monopolization and a statement by Senator Capper that “no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates.” *Id.* (quoting 62 CONG. REC. 2058 (1922)). Reliance on Congress’s rejection of the antimopolization amendment is misplaced, see notes 75-81 and accompanying text *infra*, and “substantial” does not necessarily include a monopoly.

<sup>75</sup> The Senate Judiciary Committee proposed the amendment to the House version of the bill. It provided:

Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled “An act to create a Federal trade commission, to define its powers and duties, and for other purposes,” approved September 26, 1914, on account of unfair methods of competition in commerce.

62 CONG. REC. 2280 (1922). The Senate rejected the proposal by a vote of 56 to 5. *Id.* at 2281.

<sup>76</sup> See, e.g., Note, *supra* note 10, at 375-76. The *Fairdale Farms* court also placed weight on this fact. See 635 F.2d at 1043. *But cf.* Maryland & Va. Milk Producers Ass’n v. United States, 362 U.S. 458, 463 (1960) (“[W]e do not believe that Congress intended to immunize cooperatives . . . from prosecution under . . . § 2 of the Sherman Act . . .”).

<sup>77</sup> 62 CONG. REC. 2123 (1922) (remarks of Sen. Walsh).

<sup>78</sup> *Id.* at 2218 (remarks of Sen. Sterling). See also *id.* at 2218-19 (remarks of Sen. Sterling); *id.* at 2220 (remarks of Sen. Lenroot); *id.* at 2221 (remarks of Sen. Cummins). Thus, if courts held that the same facts that demonstrate a violation of § 2 of the Sherman Act also demonstrate a violation of § 1, cooperatives could be held to be illegal combinations or conspiracies in restraint of trade. The fact that such an interpretation would “render nugatory the purpose” of the Act also suggests that Congress was interested only in allowing the formation and existence of agricultural cooperatives. See note 74 and accompanying text *supra*.

Senator Walsh attempted to convince the Senate that the construction it was giving the Sherman Act would make its second section meaningless and mere surplusage. 62 CONG.

possible for farmers to monopolize.<sup>79</sup> Thus, the belief that the antimonopolization version of the Act would allow prosecutions against the very existence of cooperatives<sup>80</sup> under section two of the Sherman Act, coupled with the opinion that cooperatives could not monopolize commerce, resulted in the failure to include a declaration against cooperative monopolization in the Capper-Volstead Act.<sup>81</sup>

### B. *Judicial Interpretation of the Agricultural Cooperative Exemption*

Courts have consistently recognized the limited nature of the agricultural cooperative antitrust exemption. The Supreme Court has stated that it believes the purpose of section six of the Clayton Act and the Capper-Volstead Act is simply to allow farmers to act together in agricultural cooperatives without the cooperative being held an illegal restraint on trade.<sup>82</sup> Courts also have indicated that once formed, an agricultural cooperative is to be treated the same as business corporations under the antitrust laws, including possible violations of section two of the Sherman Act.<sup>83</sup>

---

REC. 2226 (1922). Courts, of course, have not so construed the Act. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 50-51 (1911); United States v. American Tobacco Co., 221 U.S. 106, 181 (1911).

<sup>79</sup> "[I]t is not claimed, I believe, by anyone opposing this bill that it is possible for the farmers in this country to monopolize farm products generally." 62 CONG. REC. 2053 (1922) (remarks of Sen. Kellogg). "You can not possibly organize a monopoly of wheat growers, you can not organize a monopoly of cotton growers, you can not organize a combination of hay growers [or] potato growers that will constitute a monopoly in interstate commerce. . . ." *Id.* at 2123 (remarks of Sen. Walsh).

<sup>80</sup> The primary purpose of the Act was to prevent such prosecution. *See* notes 29, 67 & 74 and accompanying text *supra*. *See also* Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019, 1023 (S.D. Tex. 1972) ("The purpose of [the cooperative exemption] is to make it clear that [cooperatives] are not illegal *per se* . . ." (emphasis in original)).

<sup>81</sup> Senator Sterling, an opponent of the antimonopolization version of the bill, stated that he

understood from the Senator from Montana [Mr. Walsh] that he construed the House bill as in terms and expressly authorizing the creation of a monopoly. I can not agree with that. If there is a monopoly, however, or if there is an agreement which it is feared might be in restraint of trade to such an extent as to unduly enhance prices, the public, which is injured or any person believing the public to be injured, may make complaint.

62 CONG. REC. 2219 (1922). Senator Walsh was the primary supporter of the antimonopolization version of the bill.

<sup>82</sup> Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 465 (1960) ("The language shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being 'held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws,' as they otherwise might have been.").

<sup>83</sup> We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as enti-

None of the cases that the Second Circuit cited in support of its proposition that cooperatives violate section two of the Sherman Act only if they engage in predatory practices were predicated on a finding of predatory practices.<sup>84</sup> Furthermore, one court has ruled that "[a] cooperative can lose its exemption if it monopolizes, or attempts to monopolize, or engages in 'predatory practices,'"<sup>85</sup> and has applied the same test for unlawful monopolization to cooperatives as is applied to corporations.<sup>86</sup>

---

ties. . . . 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. It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly. . . .

*Id.* at 466-67. See also *North Tex. Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966):

[F]armers may act together in a cooperative association, and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation.

*Id.* at 194 (emphasis in original); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1023 (S.D. Tex. 1972) (The agricultural cooperative exemption is intended "to give farmers the opportunity to compete as entities in the same fashion as business corporations.").

The strongest statement that cooperatives are exempt from § 2 of the Sherman Act occurs in *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900 (D. Mass. 1954). In that case, the trial judge charged the jury that "it is not a violation of the Sherman Act or any other anti-trust act for a Capper-Volstead cooperative to acquire a large, even a 100 per cent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling." *Id.* at 907. The court, however, appears only to have been pointing out that monopoly power alone is insufficient to violate § 2. In the very next paragraph, the court states that "it would be a violation of the law, and . . . a prohibited monopolization for a person or group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, or through a predatory practice. . . ." *Id.* (emphasis added).

<sup>84</sup> See *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 423 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1972); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 388 F.2d 789 (3d Cir. 1967); *North Tex. Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966). As the district court in *Fairdale Farms* stated, "proof of predatory practices adds substantial weight to a plaintiff's monopoly claim, but . . . it is [not] a necessary element." *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,116 (D. Vt. Nov. 2, 1979), *aff'd in part and rev'd in part*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981).

<sup>85</sup> *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 216 (9th Cir.) (emphasis added), *cert. denied*, 419 U.S. 999 (1974).

<sup>86</sup> *Id.* In *Treasure Valley*, the defendants were charged with monopolizing the potato processing market in Idaho and Oregon. The Ninth Circuit measured the defendants' conduct against the two elements set forth in *Grinnell*. See notes 54-55 and accompanying text *supra*. The court found that the plaintiffs had failed to establish either element. 497 F.2d at 209-10.

In *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), the Ninth Circuit again indicated that the *Grinnell* standard is the appropriate one by which to evaluate a cooperative's conduct when charged

Finally, in the analogous situation involving a charge of attempt to monopolize,<sup>87</sup> one court recently rejected the *Fairdale Farms* standard. In *United States v. Dairymen, Inc.*,<sup>88</sup> the Sixth Circuit rejected a standard that would have held agricultural cooperatives liable for attempting to monopolize only if they engaged in predatory conduct.<sup>89</sup> Instead, the court ordered the application of the same standard as is used to measure the conduct of ordinary business corporations.<sup>90</sup>

### C. *A Proposal*

The current status of agricultural cooperatives in the economy suggests that they should be treated no differently from corporations. Cooperatives had little economic power in the early 1900s,<sup>91</sup> and one of the purposes of the antitrust exemption may have been to equalize their bargaining power with corporations.<sup>92</sup> Today, however, cooperatives have achieved that equality.<sup>93</sup> Therefore, that purpose of protection is outdated.<sup>94</sup> In fact, a recent national commission expressed concern over the monopoly potential of cooperatives,<sup>95</sup> stating that "[a] compel-

---

with violating § 2 of the Sherman Act. The court held that it was within the jury's province to find the defendants guilty of violating § 2 in part because they were properly instructed as to the elements of the offense enunciated in *Grinnell, Id.* at 1203.

<sup>87</sup> Section two of the Sherman Act also includes the offense of attempting to monopolize. 15 U.S.C. § 2 (1976). The elements of the offense of attempting to monopolize are (1) that the defendant has engaged in anticompetitive conduct (2) with specific intent to monopolize, and (3) a dangerous probability that the attempt would succeed exists. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

<sup>88</sup> 660 F.2d 192 (6th Cir. 1981) (per curiam). The defendant was charged with attempting to monopolize the market in grade A milk in the southeastern United States. *Id.* at 193. The district court had held "that the Capper-Volstead Act . . . exempt [*sic*] agricultural cooperatives from liability for attempts to monopolize unless their anticompetitive conduct is deemed 'predatory.'" *Id.* at 194.

<sup>89</sup> *Id.* The court rejected this standard because it sets "too high a burden." *Id.*

<sup>90</sup> *See id.* at 194-95.

<sup>91</sup> In 1920, 32 million farmers operated approximately 6.5 million farms. STATISTICAL ABSTRACT OF THE UNITED STATES 584-85 (94th ed. 1973). "[E]arly-twentieth-century American farming epitomized the pure competition model." Note, *supra* note 10, at 352.

<sup>92</sup> *See, e.g.*, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 306 (1955); Levi & Sporleder, *Some Recent Interpretations of the Capper-Volstead Act: A Legal-Economic Analysis*, 14 IDAHO L. REV. 435, 439 (1978).

<sup>93</sup> In 1977, cooperatives had combined sales of over \$43,584,000. STATISTICAL ABSTRACT OF THE UNITED STATES 704 (101st ed. 1980). Seven cooperatives were listed in the *Fortune* 500 in 1978. *Farmer Cooperatives* 14 (July 1979). Furthermore, in 1974-1975, cooperatives handled about 27% of the agricultural products marketed in the United States. FARMER COOPERATION SERVICE, U.S. DEPT OF AGRICULTURE, STATISTICS OF FARMER COOPERATIVES v (F.C.S. Research Report 39, 1977). Regional cooperatives accounted for between 71% and 100% of sales in the following commodities in 1973: sugar (100%), tobacco (100%), nuts (96%), livestock and products (88%), cotton and products (76%), dairy products (75%), rice (74%), poultry products (73%), and beans and peas (71%). FARMER COOPERATION SERVICE, U.S. DEPT OF AGRICULTURE, COOPERATIVE GROWTH: TRENDS, COMPARISONS, STRATEGY 25 (F.C.S. Information 87, 1973). *See generally* Note, *supra* note 10, at 342-43.

<sup>94</sup> *See* 5 H. TOULMIN, *supra* note 59, § 6.3, at 345; Note, *supra* note 10, at 355, 357.

<sup>95</sup> 1979 REPORT, *supra* note 2, at 258-60. Between 1950-1951 and 1974-1975, the

ling case for monopoly cooperatives has yet to be made,"<sup>96</sup> and recommending that the antitrust treatment of cooperatives, once they are formed, should parallel that accorded ordinary business corporations.<sup>97</sup>

Cooperatives are not so dissimilar from ordinary corporations as to justify special treatment. The primary differences are (1) that cooperatives may be formed with or without capital stock, and (2) that cooperatives generally deal with their members or shareholders, not third parties.<sup>98</sup> In other respects, cooperatives are similar to corporations. For example, members or stockholders of a cooperative, like shareholders in a business corporation, ordinarily are not liable for its debts.<sup>99</sup> Indeed, cooperatives today typically are organized as corporations.<sup>100</sup>

Courts are not precluded under the antitrust laws from treating cooperatives and corporations similarly.<sup>101</sup> The application of the *Grinnell* test for unlawful monopolization,<sup>102</sup> which the *Fairdale Farms* court rejected,<sup>103</sup> would not burden cooperatives. The *Fairdale Farms* court was concerned that the application of the *Grinnell* test would inhibit the growth and operation of cooperatives.<sup>104</sup> The *Grinnell* test, however, ap-

number of agricultural cooperatives declined by nearly 25%. FARMER COOPERATION SERVICE, U.S. DEP'T OF AGRICULTURE, STATISTICS OF FARMER COOPERATIVES v (F.C.S. Research Report 39, 1977).

<sup>96</sup> 1979 REPORT, *supra* note 2, at 260. Commentators have criticized the exemption as being without economic justification. *E.g.*, 5 H. TOULMIN, *supra* note 59, § 6.1, at 334 ("[E]conomically, there seems to be no sound reason for the exemption. . . ."); Noakes, *supra* note 3, at 407 ("Perhaps one of its most distinctive features is its apparent lack of justification as being directly in the public interest.").

<sup>97</sup> 1979 REPORT, *supra* note 2, at 253.

<sup>98</sup> LEGAL PHASES, *supra* note 11, at 7, 10.

<sup>99</sup> *Id.* at 8. Cooperatives now obtain borrowed and equity capital from the same types of sources as do corporations. *See* ECONOMICS, STATISTICS, AND COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, THE CHANGING FINANCIAL STRUCTURE OF FARMER COOPERATIVES 67-72, 125-32 (Farmer Cooperative Research Report 17, 1980).

<sup>100</sup> *See* ECONOMICS, STATISTICS, AND COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, THE CHANGING FINANCIAL STRUCTURE OF FARMER COOPERATIVES 36-40 (Farmer Cooperative Research Report 17, 1980).

<sup>101</sup> *See* 5 H. TOULMIN, *supra* note 59, § 6.21, at 367 ("[I]t would be relevant in passing upon the reasonableness of restraints by cooperative associations and agricultural interests to consider exactly what is their present relative bargaining power. That is within the Courts [*sic*] power." (footnote omitted)); notes 91-97 and accompanying text *supra*. *But see* Note, *supra* note 10, at 367-68 (concluding that a legislative solution is necessary). The *Fairdale Farms* court also apparently thought that congressional action would be necessary. *See* 635 F.2d at 1045 n.7. Concededly, a drastic restriction of the law's protection in response to the changed economic status of agricultural cooperatives should come from Congress; however, this does not justify the Second Circuit's decision to *broaden* that protection.

<sup>102</sup> *See* note 61; notes 54-55 and accompanying text *supra*.

<sup>103</sup> *See* notes 57-62 and accompanying text *supra*.

<sup>104</sup> *See* 635 F.2d at 1043, 1045. The district court had addressed this concern:

[The cooperatives'] fear may be real, but it does not justify affording cooperatives different treatment than corporations under section 2 of the Sherman Act. The legislative history of the Capper-Volstead Act as well as the cases that discuss it repeatedly demonstrate that Congress intended the Act to

pears to require an intent to obtain a monopoly,<sup>105</sup> and the monopolization offense preserves "the right to normal growth."<sup>106</sup> Thus, cooperatives would be able to seek additional members as long as they do so without an intent to monopolize. At the same time, they would not be able to engage in activities that do not reach the status of predatory practices for the purpose of obtaining monopoly power.<sup>107</sup>

### CONCLUSION

The Second Circuit erred in *Fairdale Farms* by holding that agricultural cooperatives are not subject to the same test for violations of section two of the Sherman Act as ordinary business corporations. The legislative history of the cooperative exemption, judicial interpretations of it, and the current economic position of agricultural cooperatives support the conclusion that cooperatives, once formed, should be treated like other business corporations. The Second Circuit's creation of a separate standard for cooperatives for purposes of section two violations of the Sherman Act creates a dangerous potential for cooperative monopoly power.

*Alan M. Anderson*

---

put farmers on an equal footing with the corporations they faced in the marketplace, not to give them an unfair advantage.

1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,119 (D. Vt. Nov. 2, 1979), *aff'd in part and rev'd in part*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981).

<sup>105</sup> The *Grinnell* Court stated that unlawful monopolization requires "the willful acquisition or maintenance" of monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (emphasis added).

<sup>106</sup> *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 215 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

<sup>107</sup> The definition of "predatory practices" is unclear. *See* note 48 *supra*. Commentators are unable to agree on a single definition. *See, e.g., Areeda & Turner, Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977). *See generally* Brodley & Hay, *supra* note 9, at 741-65.

Predicating antitrust liability on a showing of predatory practices might allow a cooperative to obtain a monopoly by engaging in activities that do not reach the status of predatory practices. In addition, requiring a showing of predatory practices creates a high burden of proof for potential plaintiffs. The Sixth Circuit has rejected a district court ruling that cooperatives are liable for attempting to monopolize only if their conduct is predatory, in part because such a burden is too high. *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981) (*per curiam*). Instead, the court used the same test for liability that is applicable to other business corporations. *See id.* at 194-95. *See also* notes 87-90 and accompanying text *supra*.